94-164

SUPREME COURT

OF THE

UNITED STATES.

No. 214, OCTOBER TERM, 1875.

WILLIAM FRDERIC& PIEK, HENRY R. PEARSON, MOSES TAYLOR, THE FARMERS' LOAN AND TRUST COMPANY, AND THE UNION TRUST COMPANY, *Appellants*,

vs.

THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY, GEORGE H. PAUL, JOSEPH H. OSBORN, JOHN W HOYT AND A. SCOTT SLOAN, *Respondents.*

BRIEF AND ARGUMENT FOR APPELLANTS.

JOHN W. CARY,

Of Counsel.

Supreme Court United States.

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The bill of complaint states, in substance, that the defendant Railway Company has executed several mortgages or trust deeds, upon portions of its line of railway in Wisconsin, to secure its negotiable bonds. The Complainants, Farmers' Loan and Trust Company, and Union Trust Company, are trustees named in two of said Deeds, and the other complainants are holders of bonds secured by those trust deeds. The complainants are not residents or citizens of Wisconsin. The defendants are all citizens of that State.

The bonds were negotiated in good faith, the purchasers relying solely upon the net income to be derived from the operation of the mortgaged property, for the payment of the principal and interest of said bonds. The Railway Company has no other means of paying the same. The State of Wisconsin has passed an act, set out at length in the bill of complaint, on pages 16 to 21 of record, which assumes, arbitrarily, to fix the rates of compensation to be hereafter charged by said railway company for the transportation of freight and passengers. The rates so prescribed, if adopted by the Railway Company, and the road operated in pursuance thereof, will yield no net revenue, and in consequence neither principal or interest of said bonds will be paid. The said act is claimed to be unconstitutional and void. The said defendants, Paul, Osborn and Hoyt, who have been appointed Commissioners under said act, and are by its terms, authorized to reduce said rates, even below the figures named therein, and are specially charged with its execution and enforcement, and the said defendant, A. Scott Sloan, who is Attorney General of the State, threaten to enforce said law, and to bring a great multitude of suits, against said Railway Company, its officers and agents, to compel said Company to adopt the rates of compensation named in said act, and otherwise oppres said Company, and that if not restrained will compel said Railway Company to operate its road under said rates, so as to produce no net revenue. And that in consequence said bonds will become worthless, and great and irreparable injury result to said complainants. An injunction against all the defendants is prayed, restraining them

from enforcing said act. The great question, however, involved in these suits and this controversy, is whether the legislature has the right and power to assume not only the management and control of the railroads of the State, but also of the whole business of common carriers by railroad, to fix their compensation, regulate the manner and mode of transacting their business, and prescribe the number, time and speed of trains—said Chapter 273, of the Laws of 1874, of Wiconsin—either directly or through its commissioners assumes all these functions, and practically takes possession of the business transacted over them. The people, instead of calling upon the officers and managers of the Company for accommodations and railroad facilities, are directed to look to the railroad commissioners, not only to redress their grievances, but to order and direct the management of the ordinary business of the comapny, and letters are received notifying superintendents that they propose to apply to the Attorney General for orders compelling the delivery of cars off the line of the company's road, if they are not furnished at such points, when and as often as desired for their accommodation.

The State of Wisconsin, through its Legislature, claims all these powers. Its Supreme Court, after a full hearing, has adjudged the claim well founded, and has hastened, by a preliminary injunction to enforce obedience to it. The average politician and Granger within its borders are now jubilant over the prospect open to their view of enjoying other people's property without compensation, or if any is to be paid, then only such as they may

choose to dictate, and the grave question comes before this Court to determine whether such claims are to be recognized as law—whether, in fact, we are gravitating toward barbarism, or whether our course is still onward in the march of civilization and progress.

The Court has jurisdiction and can grant the relief prayed.

1*st.* *It has jurisdiction of the parties.*

The complainants are all citizens of foreign states or countries, and therefore entitled to sue citizens of the state of Wisconsin in this Court.

The defendants are all citizens of the State of Wisconsin, and may be sued in this Court by persons not citizens.

The fact that some of the defendants hold state offices, and that the suit is against them in that character or rather for their acts done or threatened, by virtue of, or *in colore offici*, does not exempt them from the process and jurisdiction of this Court. Their office clothes them or their persons with no sanctity. Their acts are either legal or illegal. If legal they will be protected in this tribunal, but if illegal, the fact that they were state officers is no justification for the injury which they threaten to commit. It is their individual action that is complained of and it is claimed that such action is wrong and not justified by law.

In U. S. Bank vs. Osborn et. al., 9 Wheaton 738, the defendants were state officers, Auditor, Treasurer and Collector, their acts official acts, in collecting a tax assessed by the State against the Bank. The State was sole party interested in the subject matter of the suit. Yet

the Supreme Court held the action properly brought, that the State was not a party, and that the court had jurisdiction. In Dodge vs. Woolsey, 18 Howard 331, the complainant was a citizen of Connecticut, a stockholder in a Bank, and filed his bill against the directors of the Bank, the Bank itself, and George C. Dodge, the Treasurer, and Collector of Cuyahoga County, to restrain the collection of a tax levied by the State of Ohio on the bank, in violation of its charter, and the injunction was granted.

See also Gordon vs. Hobart, 2 Sumner, C. C. Rep. 401.

2nd. *This Court has jurisdiction of the subject matter of the action.*

The complaint sets forth that an injury is threatened by the citizens of this State, against the property and rights of the complainants, and this Court is asked to restrain the threatened injury. But it is claimed that the persons threatening the injury are state officers, and the acts charged, which they are about to commit, are authorized and enjoined upon them by a state law. Therefore, that it is the state that is acting, and that the restraint of her officers is a restraint upon the State, and that the granting of the complainant's prayer, would in effect be an injunction against the State, and prevent her from carrying out and executing her laws.

Suppose we admit it, what then? Is the court ousted of jurisdiction, and the complainants deprived of a remedy from the threatened injury? If so, upon what prin

ciple? The nature of the injury threatened is such that the court may be properly invoked to prevent it. The state has no more right to commit an injury against the rights of the complainants, than any other person or corporation. It has no right to enact a law in violation of the constitution, either State or Federal. Such a law if enacted, is no protection to the state or its officers, and all attempts to enforce it may be lawfully resisted. All acts and attempts in that direction are unlawful. And all persons whose property or rights are invaded and injured by such unlawful acts, are entitled to protection and indemnity. Prior to the adoption of the 11th Article of Amendments to the Constitution of the United States, the State itself might have been made a party in its coporate name, in any action to redress or prevent a wrong done or threatened to citizens of a foreign state or country. This right would still remain, but for that 11th Article of the Amendments. That Article provides, that; "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced, or prosecuted, against one of the United States, by citizens of another State, or by citizens or subjects of any foreign State"

This amendment simply forbids making a state a formal party to the record—nothing more. It does not prohibit the making of the persons holding state offices such parties. They are amenable to the process of this Court, and liable for all the consequences of their acts. The judgment in this case will not bind the State. The injunction will not restrain it, but will operate only upon

the parties named as defendants. They are individually responsible for their acts, and the injunction will operate to restrain their individual, personal, action only. It is not, therefore, an action against the state, or in violation of the 11th Article of Amendments to the Constitution of the United States.

This precise question was discussed at length, by Chief Justice Marshall, in Osborne vs. United States Bank, 9 Wheaton, pages 846 to 859. The conclusion that he arrived at is as follows:

"It may, we think, be laid down as a rule, which admits of no exception, that in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently the 11th Amendment, which restrains the jurisdiction granted by the constitution over suits against States, is of necessity, limited to those suits in which a state is a party on the record. The amendment has its full effect, if the constitution be construed as it would have been construed had the jurisdiction of the court never been extended to suits brought against a State, by the citizens of another state, or by aliens."

The case of Mayor of Baltimore vs. Pittsburgh and Connellsville R. R. Co., 1 Abbotts, U. S. C. C. Rep. 9., was a case where the city of Baltimore, had advanced money to the railroad and the charter was subsequently in part repealed and route changed. The city filed its bill in the Western District of Pennsylvania, before Judge Grier, to restrain the railroad company from accepting or acting under the charter as amended, and to

have the amendment declared unconstitutional. The jurisdiction was sustained and the relief granted.

II.

The jurisdiction of the Court both as to the parties and subject matter being settled, we are now to inquire whether the relief prayed can be granted.

The allegations of the bill are fully supported by the affidavits. The interest of the complainants is manifest. The danger apprehended imminent and threatening. Unless the relief prayed can be granted, great and irreparable injury will result. Can this danger be averted?

The defendants claim to be acting under and in pursuance of the law (Chapter 273, of 1874) set out in the complaint, and that all their proposed action is based upon, and enjoined upon them by that act, and that, however injurious it may be to the interests of the complainants, their action is authorized and lawful, and that said act is a full justification to them in all courts and places. Such an act has been passed, and if valid as a law, authorizes all that is claimed for it. We are therefore brought to the consideration of the constitutionality of that enactment. If constitutional and valid, then the defendants are justified in their proceedings, and the complainants are remediless. But, if that act is unconstitutional and void, then the defendants are not justified in

their proceedings, and the complainants are entitled to the relief prayed in the bill of complaint.

The said act (Chapter 273, of the Laws of 1874) among other things, assumes, arbitrarily, to determine the compensation which the defendant Railway Company may charge for the transportation of freight and passengers over its line of road, and necessarily assumes, to that extent, the control over, and the appropriation and disposition of the use of the property of the defendant company, without their consent. We therefore insist

II.

That said act, so far as it attempts to fix the rates of compensation to be charged by the defendant company, for the transportation of freight and passengers, is unconstitutional and void.

The right to control one's property and fix the price for its use, is an attribute of ownership, and the right to fix and determine the compensation, for which any one will render his personal services, and incur risks and dangers in transacting the business of another, is a personal right necessary to man's freedom and independence. This pretended law ignores those rights, and thereby violates both the constitutions of this state and of the United States.

1st. It is repugnant to Section 13 of the Declaration of Rights of Wisconsin. "The property of no person "shall be taken for public use without just compensation

"therefor." 2d. It is in violation of Section 1 of Article 14 of Amendments to the Constitution of the United States. "No state shall make or enforce any law which "shall abridge the privileges or immunities of citizens of "the United States. Nor shall any state deprive any per- "son of life, liberty, or property, without due process of "law, nor deny to any person within its jurisdiction the "equal protections of the laws."

The law in question assumes to take property now in possession of the Company, and which the shareholders of the Company claim to own, and exercise over it such control as only the owner can exercise. To that extent the owner is deprived of his property. The most important and valuable function connected with the ownership of property, is the right to determine the compensation to be paid for its use. Property is chiefly valuable to the owner on account of the income it yields. This law takes this right from the owner, and without it the property may be entirely worthless. All right of control is taken from him, and the authors and advocates of this law claim that it has been enacted for the public benefit; hence, if this be true, the property and rights of the owner, so far as he has been deprived of them, have been devoted or subjected, to public use. The same is true of the labor, the mind and talent or capacity for transacting the business of a common carrier, of the owner himself. If, therefore, we are the owners of this property, and of the labor, mind and capacity necessary to transact the business of a common carrier, we are, *pro tanto*, deprived of our property and rights, and under pains and penal-

ties, fine and imprisonment, compelled to use our property, contribute our time and labor, and incur the risks and hazzards attendant on the business of a common carrier, for the compensation prescribed in this act, and are thereby deprived not only of our property, but of our just rights and the equal protection of the laws. It is denied, however, that we are the owners of this property, and hence not entitled to invoke the protection of the constitution, but that the railroad is the property of the state, farmed out to the company during the state's pleasure; that it can at any time take possession, not only of the corporate franchises, but of the property itself, without compensation to the company or its shareholders.

Were we to admit this proposition, monstrous as it is, still on what principle could this law be sustained, for not only is the railroad and all the property of the company confiscated by it, but the business of a common carrier as well. Certainly, the labor, mind and capacity, necessary to carry it on, does not belong to the state. Admitting, for the moment, that the state owns the railroad, or has the right to fix the compensation for its use, still that would give it no right to fix the compensation of a common carrier doing business on it. The road is one thing, the business of a common carrier quite another. In some instances railroad companies simply furnish cars and haul them for a given compensation, for parties who are engaged as common carriers, as in the case of express companies. In other scaes they simply haul the cars of other parties for a

given compensation. In the last report of the Massachusetts commissioners, they express the opinion that the time is coming when railroads will cease to transact the business of common carriers as at present, and confine themselves simply to the business of hauling cars over their respective roads for a given compensation. Whether such a result is to happen time alone will determine, but certain it is, the two things are not the same, nor are they, in the nature of things, necessarily connected. Whether they can be practically separated need not now be determined. We insist, however, under this head,

1st. *That the shareholders of the Company are the absolute owners of the railroad and all the property of the Company.*

This proposition is so plain and elementary, and has been so often and uniformly asserted by the courts, that it seems a work of supererogation to adduce authorities to substantiate it. But as the opposite doctrine has been asserted, and would seem to be a necessary foundation for such a structure as the Potter Law of last winter, I will ask the indulgence of the Court, while I cite a few of the many authorities of our courts to show that the above proposition is correct.

The Company is chartered by the state, and is endowed with the privilege of exercising the power of eminent domain, so far as it may be necessary to procure the right of way for its road, but in fact more than ninety-nine hundredths of all its grounds of every description are acquired by negotiation and purchase, and the title conveyed to the Company by warranty deed in fee sim-

ple The remaining hundredth part is generally acquired, after proceedings to condemn have been instituted, by purchase, and the title conveyed by deed. The commismissioners only naming the amount which the Company must pay. Hardly any of the grounds of the Company are held by judgment entered in proceedings authorized by the charter for acquiring land by the exercise of the right of eminent domain. All lands, however acquired, are paid for wholly by the Company. The road is constructed by the Company and at its sole expense. All the property of every description belonging to the Company, and used in operating the railroad, is purchased and paid for by the Company. Applying the rules of law to such a case, the ordinary mind would naturally come to the conclusion that the Company, or its shareholders, owned the road and the property of the Company. It would seem to need no argument or authority to prove it, and that it would require a sort of sublime impudence to assert, before an intelligent court or public, that the state, under such circumstances, and not the Company, was the owner of the property.

Angell and Ames, Sec. 40, class railroads as private corporations, and in Sec. 31 they say "railroads are private corporations." * * * "Both the property and the sole object of every such corporation are essentially private."

In Whiting vs. the Sheboygan and Fond du Lac Railroad Company, 25 Wis. 167, the Supreme Court of this state decided that railroad companies are private corporations and the owners of their property. And the Su-

preme Court of the United States, in reversing this case on another point expressly affirm it on this and say: "That railroads, though constructed by private corporations and owned by them, &c." Again they say: "The owners (of a railroad) may be private companies," &c., fully recognizing the doctrine that a Railroad Company owns its road.

In the People ex rel., vs. Salem, 20 Mich. 477, Judge Cooley says: "The road, when constructed, is nevertheless to be exclusively private property, owned, controlled and operated by a private corporation for the benefit of its own members, and to be subject to the supervision and control of the state only as other private property." Again he says, page 478: "They are private property whose owners make it their business to transport persons and merchandise in their own carriages, over their own land, for such pecuniary compensation as may be stipulated."

In People vs. Batchellor, 53 N. Y. 140, the Court, speaking of railroads, says: "But it is equally clear that property acquired by the corporation, belongs to it exclusively, and its ownership is as absolute as that of any private individual of property belonging to him. It is also clear that so far as the road is operated for the benefit of its stockholders, the corporation is private. We have then an artificial being created by the legislature, endowed with public franchises, the absolute owner of property of which it cannot be deprived by legislation except for public purposes, carrying on business for the private emolument of its stockholders."

"The roadway of a railroad, however, is but a small part, comparatively, of the property of a company. The grades, ties and track, the buildings, bridges and other works, with the shops, machinery and equipments, together with the roadway and the out laying lands, represent the outlay and property of the corporation. These are all recognized and declared, by every elementary work relating to railroad corporations, to be private property, owned, operated and used by the Company as a private corporation for the benefit and advantage of the stockholders; and I am not aware of any decision of any court that announces its judgments in the English tongue, to the contrary."—Judge Swan's pamphlet.

Donaher vs. State of Miss., 8 Smedes and M., 649, 661.

Trustees, etc. vs. Auburn and Roch, R. R., 3 Hill, 570.

Ohio etc, R. R. vs. Ridge, 5 Blackf., 78.

Bonaparte vs. Camden and Amboy R. R., 1 Bald. C. C., 205, 222.

Dearborn vs. Boston and Montreal R. R., 4 Fos., 179.

Tinsman vs. Belv. and Del. R. R. Co., 2 Dutch., 148.

The same doctrine is maintained by Redfield.

1 Redfield on railways, 53, and many cases cited in its support.

We therefore say that the Company, or more properly its shareholders, are the owners of the railroad property

It being settled that we are the owners of this property, the next question to be considered is:

2d. Does this law take our property, or any part thereof, or deprive us of its beneficial use and enjoyment?

The only value of a railroad to its owners, is the right to operate it so as to make what is commonly known as net earnings. This is the beneficial use: without it the road is of no benefit or value to the owner. Hence, if this law deprives us of the right and ability to make net earnings from its operation, our rights are invaded, our property confiscated and taken from us without due process of law The taking of the beneficial use of the property, is a taking of the property just as effectually as though we were deprived of the actual possession.

Prior to the passage of this law, we, as owners, were entitled to fix the compensation to be paid to us for the transportation of freight and passengers over our road.

In the case of the State Freight Tax, 15 Wallace 227 and 8, Judge Strong says: "we concede the right of the owners of artificial highways, whether such owners be the state, or grantees of franchises from the state, to exact what they please for the use of their ways. *That right is an attribute of ownership.*" But there is no necessity to cite authority to show that the owner of property has the absolue right of disposition, not only of the property but of its use. It is an elementary principle, and axiomatic, even. We possessed this right as owners of the railroad and its appurtenances. By the exercise of that right a scale of prices was fixed for the business of 1873, by which some net revenue was realized, but less than four per

cent. upon the capital invested. The total cost of the property in Wisconsin was $28,074,317.35. The total gross earnings in Wisconsin for 1874 is $3,190,523.64. The total net revenue applicable to interest and dividend less than thirty per cent. of the gross earnings, (Record, pp. 14 and 15.) This act assumes to fix our rates nearly thirty per cent. below the rates fixed by the company, on which the business of last year was transacted. Hence, if this law is enforced, we have this result This property operated under the control and direction of the company, and as they lawfully might do, yielded a net revenue to the company of nearly four per cent. on its cost. About the sum of one million of dollars, and very nearly thirty per cent. of it gross receipts. The same business transacted on the same road this year under the rates fixed by the Potter law, yields a gross income thirty per cent. less than was received in 1873, and no net revenue is realized. And as the net income or revenue constitutes the sole profit and measure of value of the road, if this law is sustained, and retained, as the permanext policy of the state, the value of the road is entirely destroyed and lost, both to the bond and stockholders. Is it not plain, therefore, that this law not only takes, but confiscates the property of the Company? The deduction from the rates of the Company is a deduction to be taken entirely from the net earnings. The deduction is thirty per cent. nominally, from the gross earnings, but as the expenses are in no way decreased, the same amount now required for operation will be required under

this law; consequently the whole deduction made by the law comes from the net earnings and completely absorbs them. Had the act, Chap. 273, of 1874, provided that the Company should, by state authority be deprived of thirty per cent. in miles of the entire length of its road, its operation would not have been as injurious to the company as it now is, especially if the company could have selected the portion to be taken. But even taking an average of the lines of the Company, it would have been less injured by a total deprivation of thirty per cent. in length of its lines than by the confiscation of thirty per cent. of its income, as the law now stands. Taking thirty per cent. in length of the road would be simply taking that amount of the Company's property; but taking thirty per cent. of its entire gross earnings is equivalent to taking the whole property, for thereby the whole property is made valueless to the owners. No net revenue can be realized from any part of it; consequently the Company would have nothing with which to pay either interest or dividend. It would have only the poor and barren privilege left of operating the road for the public without any compensation, while its bondholders would have to be content without either principal or interest on their money, and the shareholders would look in vain for any return to their investment. It is not necessary to spend time in argument to show that such a taking and interference with the use of the property of another, is as emphatically a taking within the meaning of the constitution, as it would be were the company actually ousted

from the possession of the property. In the year 1873, we were authorized to take the rates fixed by the Company, and but for this law, might have charged and received the same in 1874. But by this act we are prohibited from using and enjoying our property in our own way, and, as would have been most beneficial to us, and are compelled to abandon all beneficial use thereof to the owners. This we insist is a taking, a depriving us of our property, either partial or total, and just as effectual and complete as though we had been driven from the actual possession thereof, and the agents of the State had taken possession and were now operating the road. The case of Pumpelly vs. Green Bay Company, 13 Wallace, 166, was a case where the waters of Lake Winnebago were raised by a dam so as to set back upon plaintiff's land and deposit earth and ground thereon, and the nature of the injuries was such as to show that it worked an almost complete destruction of the value of the land. It was there claimed that there was no taking of the land within the constitutional provision. In disposing of this point, page 177, Mr. Justice Miller says: "It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security of the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators, as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be

held that if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effcet, subject it to total destruction without making any compensation, because, in the narrowest sense of the word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors." Is not this language equally applicable to the case in hand. Technically, in the narrowest sense of the term, our property is not taken—we are not actually ousted from its possession — but we are deprived of the control of our property and of the only valuable attribute it possessed—the ability to make net earnings, and thus furnish an income to the owner. We submit that we have now shown, 1st. That the company or its shareholders were the owners of this property. 2d. That it has been taken from it, or them, or its beneficial use seriously impaired by this law. We now ask,

3rd. By what right has this been done?

If it was a taking of our property for public use, it was in violation of the Constitution of Wisconsin, because no compenstion was made. If without due process of law then it is in violation of Section 1, of the 14th Article of Amendments to the Constitution of the United States, and void.

If taken for public use, then just compensation must be made. But the act provides no means for ascertaining or making compensation Hence it cannot be sustained as a taking for public use under the right of eminent domain, and that an act of the legislature is not due process of law in such a case, needs no argument before this court.

That the Company by this act suffers loss and damage through the taking of its property or its beneficial use, is clear, and unless there is some authority for it, which overrides the clauses of the constitution above referred to, the act must be held unconstitutional and void.

But it is insisted that this act is not repugnant to the constitution, for the reason that the charges of railroad companies for the transportation of freight and passengers, may be regulated and fixed by the legislature, without any violation of their vested rights, or these provisions of the fundamental law.

1st. Because the power to exercise the rights of eminent domain is conferred upon them by the State on this condition.

2d. That railways owned and built by private corporations are public highways and are the property of the state, and subject to its control the same as common highways.

3d. That the business of a common carrier is of a public nature, and for that reason, the state cannot only regulate it, but can also fix the compensation that may be charged and received.

4th. That the reserved power, so called, Section 1, Article 11, of the Constitution of Wisconsin, gives this authority to the legislature, and overrides all other provisions of that instrument.

Of these in their order. *First*, as to the grant of *Eminent Domain* conferred upon the Company, I have already said in regard to this power that very little of the real estate of any Railroad Company in Wisconsin is held by any such title. That nearly all of their right of way and grounds are held by deed conveying the title in fee simple, and while it is true that all the Railroad Companies of the State are clothed with the power to exercise this right, and that it is necessary that they should possess it, still it would be purchased at too dear a price, if in exchange for it, we are compelled to surrender all control of the compensation to be paid us, not only for the use of our property, but also, for our personal services, the material necessarily furnished, and risks incurred, in carrying on the business of common carriers.

The right of eminent domain may be exercised not only when the safety, but also when the interests or even the expediency of the state is concerned, or where the land of the individual is wanted for a road, canal or other public improvement. If the public interest can be in any way promoted by the taking of private property, it must rest in the wisdom of the legislature to determine whether the benefit to the public will be sufficient to justify the taking. Any improvement of a public nature, in which the public, or any considerable portion of them would be benefited, their condition bettered, or

their convenience subserved, and which cannot be accomplished without the exercise of this power, is a proper object for its excercise, whether the improvement is to be made by the state or by private parties, and the legislature is the sole judge as to the propriety of granting or withholding it.

In the 25 Wisconsin, 196, it is claimed that the "public use, which has been held to justify the application "of the doctrine of eminent domain, in the case of rail-"roads, owned and operated by private individuals, con-"sists in the fact that the owners cannot, without reason-"able excuse, refuse to receive and transport passengers "or freight, when offered, at usual rates, and in the fact "that *the state retains the power to regulate and control the "franchise, and limit the amount of tolls which it shall be "lawful to charge.*"

The first part of this proposition we find no fault with it is a correct statement of a part of the duty of a common carrier, and is as true of the carrier by wagon or steamboat, as of the railroad built through the exercise of this right of eminent domain. No additional duty in this respect, is cast upon the carrier by railroad in consequence of the exercise of this right But the balance of the proposition is denied. The only authority cited by the Chief Justice to sustain that opinion, is an *obiter dictum* of Justice Woodbury, in a sort of personal, half way dissenting opinion, given in West River Bridge Company vs. Dix, 6 Howard, 546. The question before the court at that time was whether the franchise and property of the said Bridge Company could be taken for

public use. There was nothing in the case to call for the expression found in the opinion which is quoted and the expression or statement made by Mr. Justice Woodbury, I humbly submit, is not correct in point of law, as appears from the whole legislation of the country for the last twenty-five years upon this subject It is that, it, (the improvement), "*must be under public regulations as to tolls, or owned, or subject to be owned by the state*, to make the corporation and object public for the exercise of the right of eminent domain." Such has not been the understanding or the practice of the legislature or the courts. But no such conditions and restrictions have been attached to such legislation. The power has been granted in the great majority of cases, coupled with provisions directly in conflict with such conditions. The only other authority in support of the view advanced by the Chief Justice in 25 Wisconsin, is a remark of Chancellor Walworth, made in Beckman vs. the Saratoga and Schenectady R. R. Company, 3 Paige 45, p. 74, which was an application for an injunction to restrain the Company from taking or entering upon land. The Chancellor says; "The legislature may also, from time to time, regulate the use of the franchise and limit the amount of toll which it may be lawful to take, in the same manner as they may regulate the amount of tolls to be taken at a ferry or for grinding at a mill, unless they have deprived themselves of that power by legislative contract with the owners of the road."

The case of Railroad Company vs. Chappell, 1 Rice, S. C. 383, has also been referred to as an authority, hold-

ing that "a railroad must be held as a part of the public domain, farmed out to individual men for its practical administration and order alone." The case in Paige was decided in 1831; in Rice in 1838, and West River Bridge case in 1847. They were in the infancy of railroads in this country, and when the practice of conferring the right of eminent domain upon private companies had been but little practiced. The doctrine was bitterly assailed in some of the states, particularly in New Hampshire, and judges, in sustaining the power, in some instances, as in the above cases, gave unsound reasons for their judgments. But in later years the doctrine was fully established and put on the right grounds for the public use, benefit and advantage of the proposed improvement to the people at large. It was a great question at that day, as to whether all charters should not provide, as indicated by Mr. Justice Woodbury, that the state might become the owner of all such improvements at some future period, and such provisions were sometimes inserted in the charter. But no such conditions ever obtained in the legislature of Wisconsin, and such conditions are not generally inserted in charters granted in the different states, although once thought a matter of importance.

It is manifest that the law in regard to the exercise of the right of eminent domain, as now settled, is not subject to the doubts and qualifications expressed by some of the judges in those cases. For instance, Mr. Justice Woodbury says, in the case above cited: "Who ever heard of laws to condemn private property for

public use, for a marine hospital or a states prison? So a custom house is a public use for the general government, and a court house or jail for a state. But it would be difficult to find precedent or argument to justify taking private property without consent, to erect them on, though appropriate for the purpose." 6 Howard, 546. Yet Judge Cooley, in his valuable treatise on constitutional limitations, written nearly thirty years later, and after the law on this subject had become settled, says: "When property is needed for a district school house, it is proper that the district appropriate it, and it is strictly in accordance with the general theory as well as with the practice of our government for the state to delegate to the district the exercise of the power of eminent domain for this special purpose. So a county may be authorized to take land for its court house or jail; a city for its town hall, its reservoirs of water, its sewers and other public works of like importance." (p. 537.) The decisions on the subject of eminent domain in the different states, certainly have not been based upon the theory that the state reserved a right to regulate, and control, and limit the amount of tolls which it might be lawful to charge. If this principle attaches to the exercise of this right by one corporation, it must apply to all. It cannot be limited to railroads only. It would apply with equal force to a gas company, or a company to supply cities or towns with pure and wholesome water. These are public purposes, and the right of eminent domain would be granted to either; yet, could it be pretended that because it was

so granted that the state would thereby be entitled to regulate the charges that the companys should make for its gas in one instance, or water in the other? Nothing of the kind would be claimed, and yet there would be just as much propriety in it as there is in claiming that the rates of fare for passengers and freight on a railroad are subject to any such rule.

"The right of exercise of the power of eminent domain, may be conferred upon an individual, as well as a corporation. It has been done in England, and in many of the States—as in Pennsylvania, to enable the owner of mineral lands, to reach them across the lands of another. By the exercise of this power A appropriates the lands of B, and is thereby enabled to bring his coals to market, and derives an income, from his otherwise dormant capital; but does this grant to A give the State the right to fix the price of the product?"

A private corporation may be empowered to exercise the right of eminent domain to obtain a way along which to lay pipe for the transportation of oil to a rail road or navigable water. West Virginia Transportation Co. vs. Volcanic Oil and Coal Co., 5 West Va. 382. Who would fix the price of this oil? Yet if by the exercise of this right the cost of producing and marketing the oil is reduced, it is a public benefit and a wise exercise of the power.

The right of the Legislature to fix the toll of a ferry or bridge rests upon an entirely different basis from that of fixing the tariff to be charged by common carriers by railroad. The stream across which the ferry or over

which the bridge is built, is the property of the State, and the State unless prohibited by its contract, may make such disposition of it as it pleases and prescribe its own terms. Not only so, but the charge in such a case is a specified toll for crossing. It is toll in its proper signification, so the charge made by the owner of a canal to a common carrier engaged in carrying goods, is a fixed amount for being allowed to carry on his business on another's canal. The business and charges of a railroad are entirely different. It consists not only of a charge for the use of the railroad, but for the personal services of those engaged in operating it, of the material to be used in operating and compensation for the risks and damages incurred in the business. There is in fact no analogy between permitting the toll charged for crossing a ferry, and the rates to be charged for transportation over a railroad, or carrying on the business of a common carrier. Is there anything in the delegation of the right of eminent domain that should or ought to change the nature or control of railroad property? Railroads are needed for the public. The state is unable or unwilling to furnish them; individuals or private corporations can better supply the public than the state itself. Such individuals or corporations are ready to furnish this public want at their own expense, and ask only that they may be allowed to take the necessary lands to construct them on, paying its full value to the owners, including all damage of every kind. Is it equitable or just, that in consideration of that right they shall be deprived of the ownership or control of any part or portion of their investment? Is not the pub-

lic benefit conferred far in excess of the right given? Especially it is so when we remember that in practice the exercise of this right is rather nominal than real.

Again, the legislation in regard to railroads in this state, flatly contradicts this theory put forth in the 25th Wisconsin, that the right to regulate and control the toll or charges of railroads is incidental, or adheres to the grant of the right to exercise the power of eminent domain. Every charter granted by the state so far as my examination extends, expressly confers the power upon the Board of Directors of the Company, to regulate the tolls and to fix such rates for the transportation of freight and passengers over the road, as they from time to time may deem reasonable. In some of the states the general statutes of the state authorizing the formation of railroad companies have fixed and prescribed maximum rates to be charged by such companies, and in other states the special charters of the companies have contained such limitations. In all such cases the charters were accepted with that limitation, and it is binding upon the company and will follow the road, should it pass out of the hands of the original company, even to one authorized, to charge a higher rate on roads constructed by it. The original limitation inheres to the property, unless removed by the legislature, and is a proper exercise of the power of the state. But it was left for Wisconsin to lead the way, in this attempt to have the legislature fix the compensation of railroads, after they had been built, and rights vested upon the understanding that the company possessed that right. Had the power

to regulate tolls inhered in the grant of the right of eminent domain to the state, it is strange that no state has ever before asserted it or acted upon it.

No such doctrine is found in any well considered case where that question was in issue. The case in 25 Wisconsin, where the doctrine was distinctly put forth, was a case on the power to tax for the benefit of the railroad. Justice Woodbury was not delivering the opinion of the court in the case in 6 Howard, but expressing his views generally, upon the subject of exercising the right of eminent domain by any other than the government, at a time of considerable excitement on that subject, when that was not the point before the court, and it would not be unreasonable to suppose, that his views were somewhat warped by the bitter contest that then raged in his own State, which had divided his friends, and separated the Nestor of the Democratic press, from the younger and radical portion of the party. The statement of Chancellor Walworth was not an adjudication upon that point, and the doctrine or practice contended for in 25 Wisconsin, has never been the law in New York. It has been said by a learned jurist that, "if the public interest can be in any way promoted by the taking of private property, it must rest in the wisdom of the Legislature, to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain, and to authorize an interference with private rights of individuals for that purpose"

2 Kent 260.

3 Paige 73.

Cooley's Limitations, 530 to 539.

This is the only true ground upon which the right rests. It should be granted or refused, according as the public interest will, or will not be promoted thereby. The judgment of the legislature alone must determine this question, and when granted it is upon such conditions, and such only as the legislature shall poescribe. Therefore, in order to ascertain the conditions, if any attached, we must examine the terms of the grant. If none are found, then none attach, and only such as are found in express terms, or by necessary implication. can be enforced.

4th. Another ground taken by some in favor of the authority of the state to prescribe the charges of railroads, is that they are public highways. The property of the state farmed out to the Company for operating, and not the property of the Company.

We have already discussed the question of ownership, and here only, briefly answer this claim of right to fix rates.

Senator Carpenter, who has published his opinion on the subject, says: "If railroads are mere private estates, owned by the corporations in absolute right, then they are no more subject to legislative control than a farm or other mere private property. If, on the other hand, railroads are public highways, then they are a part of the public domain of the state, farmed out for

administration, but subject to the control of the legislature like any other highway by land or water." This is a fair statement of the matter. It frankly admits that if the companies, that is the shareholders, own the roads, then they are entitled to their management and to fix their rates. In other words in the language of Mr. Justice Strong, that the fixing of the compensation to be paid for their use is an attribute of ownership. It is true that Mr. Carpenter is of opinion that the companies do not own their roads, that they have built and paid for, and on that account thinks their compensation may be fixed by the legislature. But we are obliged to him for his statement of the question.

That a railroad is a highway in a certain sense is not disputed; that it is not a highway in the common, ordinary sense of the term, is equally certain; in the sense that it is a great thoroughfare over which great numbers of persons and great quantities of property is transported in cars by the Company is true; but that it is open to the public, owned by the state, or in any manner controlled, or managed, or used as common highways, is not true. There is no dispute that it was built for public use, and if used at all must be used for the public or as a public use. Its ownership is exclusively in the Company. It is their right to operate and control it in their own way, subject to such police and other regulations as the state may lawfully make in respect to any other property owned by any citizen of the state; that the word highway has different meanings and is employed in different senses in the authorities

cited by Judge Strong in Alcott vs. Supervisors, is most forcibly illustrated by those authorities themselves. The Case in 3d Paige 45, is the one before referred to, where the sole question before the Court was whether the construction of a railroad was so far a public use as to warrant the exercise of the right of eminent domain. The Case of Bloodgood vs. The Mohawk and Hudson Railroad Company, was trespass for entering his close before making compensation, and the case in Metcalf was an application to compel the proper officers of Worcester, to list the railroad for taxation. The motion in the last case was denied on the ground that it was a highway, and no more liable to taxation than other common highways. Now, in the sense that the term highway was used by Chancellor Walworth in 3 Paige, in the 18th of Wendell, and as I understand the case of Alcott vs. Supervisors in 16 Wallace, the railroad remains the property of the Company. And the word highway is used in a general sense, indicating a thoroughfare, used for the transportation of freight and passengers in a peculiar manner and not entitled to the exemptions of a common highway. Not the property the state, but of a private Company, and therefore taxable as other property or in such manner as the Legislature might prescribe. But in the case in 4th of Metcalf, Chief Justice Shaw gave it a different meaning and held that the property was actually not taxable because a highway. In that case the state had reserved in

trol of its tolls. The Legislature of the State of Wisconsin treats railroads as private property, not as common highways. They have always been subject to taxation, and the same Legislature that passed this Potter law, raised the tax, on railroads so that the amount to be paid this year, amounts to nearly half a million dollars. The absurdity of attempting to treat railroads as highways of the common character and to be treated as common highways and owned by the state, is still further illustrated by a reference to section 31 of chapter 119, General Laws of 1872, "in relation to railroads and the organization of railroad companies," which prohibits any person, under a penalty, to ride, drive, or walk along on such railroad. If a highway belonging to the state as other highways, why this prohibition? it is admitted that railroads are highways in one sense of the term, but denied that the title thereto is vested in the state, or that the state has any other control over them by reason of the title of the road, than it has over any other property owned by a private citizen, or any greater or different control over it than it would have if owned by any other citizen of the state.

The sense in which the term highway is used as connected with railroads, is discusssed in 53 New York, 140.

"It is manifest that the question presented in this case was not determined in that (Alcott vs. Board of Supervisors, 16 Wal. 678) unless it shall be further held that a railroad, owned and controlled by a corporation and operated by it for the benefit of its stockholders is a

of the country. The towns through which the latter run may be compelled to construct and keep them in repair for the common use of the public. The substantial question in the present case is whether they may be so compelled to construct and repair railroads owned and operated for the benefit of the stockholders. It is clear that they may be if they are public highways in the same sense as common roads. It has been uniformly held that the right of eminent domain may be exercised so far in behalf of a railroad corporation as is necessary for the construction and operation of the road, upon the ground that the road and its operation was for a public purpose, and therefore the real estate condemned for its use was taken for public and not private use."

Public highways are owned by the state, are open to all persons to travel upon in such manner and with such carriages as they may choose. The land upon which they are constructed is taken by the exercise of the right of eminent domain, and paid for by the state or some one of its subdivisions and are not subject to taxation. On the other hand railways are owned by private companies. They are open to no one to travel upon, or use, or operate, and any persons entering upon them is a trespasser. The land upon which they are constructed may have been taken by the right of eminent domain, but was paid for by the company, and the road is subject to taxation as other private property, The only right which the public have in a road so owned is at certain stated times to be [illegible] it in cars provided and run by the

company, and to have their goods transported in like manner for a certain compensation. We therefore insist that railways are not public highways in the ordinary sense of that term, and that they are not owned by the state, but are owned by the companies or their stockholders as private property.

It is also claimed in support of this law, that the business of a common carrier is of a public nature, and therefore that the state can, not only regulate it, but can also fix the compensation that may be charged or received.

A common carrier is one engaged in the business of transporting passengers or property or both from one place to another for hire. This business may be transacted by any person and by any of the modes known to man. It may be carried on by a person traveling on foot, on horseback, or with a wagon, by any kind of a boat, or vessel, or by a railroad. That it is a public business in so for as the carrier has to do with many persons is true, nevertheless the business or employment is strictly private. That there are certain regulations governing the transaction of the business for the safety of the public is admitted. But that the state or any other power, except the parties engaged, can fix the eompensation to be paid the carrier is denied. Is it the footman who carries small packages, the man on horseback, or the wagoner, whose compensation can be prescribed or fixed by the state? Can the state fix the amount the master of the vessel or the captain of a propeller

kee to Buffalo? It will be admitted that no law has ever fixed the compensation to be paid in such cases. Yet if the compensation of neither of the carriers can be fixed by the state, can it fix any carriers rates on the ground simply that he is a common carrier? By what authority can it fix the amount to be paid a railroad company for transporting a like quantity of wheat between the same points? So far as the business is concerned they all stand on the same plane, and the rule that governs one must apply to all. It matters not whether a carrier transports one passenger or a thousand, or one ton of freight or hundreds of tons. It is the same business, and if the state has a right to fix the compensation in one case on account of the nature of the business, it has in the other, how does it make any difference in what manner the transportation is effected, whether by wagon, steamboat or railroad. It cannot be seriously contended that the nature of this business gives the state any right to fix the carrier's compensation. I am not aware that it has ever been attempted in any civilized state, save in the peculiar legislation which has afflicted a few of the states in the Northwest for the past two or three years. The business is no more of a public character than a hundred other kinds of business, which are admitted to be private and the compensation fixed by those engaged therein, without the interference of the state. It must be admitted, therefore, that if the state has the right to prescribe the compensation to be paid a common carrier, the same right extends to all other business, and the state

can fix the price of labor and services in all cases by an arbitray enactment. If this can be done, the same principle would give to the state in like manner, the right to fix the price of all products of the farm and the manufactory.

No such power has ever been conceeded, or exercised by the state, in this country, and it is in conflict with the whole structure and theory of our government, hostile to our liberty and freedom, and destructive of all progress and improvement. The late Judge Curtis, in his published opinion furnished this company on this subject, says:

"The true inqniry here is, what are the limits in this particular case beyond which the Legislature cannot pass, by virtue of this 11th article of the constitution?

First. One of these limits may be found in the nature of the act attempting to alter or amend the charter. Charters are to be amended or altered by the exercise of legislative power, and if the act in question, when rightly viewed, is not an exercise of legislative power, but passes beyond the field of legislation, then it cannot be deemed to be authorized by this article of the constitution.

And my opinion is that it is not within the field of legislation, under any American constitution, to fix and prescribe for the future what prices shall be demanded either for commodities or for personal services, or for a union of both. I do not believe it is within the power of any Legislature in the United States to compel owners of property or persons, natural or political, to part with

their property or render their personal services at their own expense and risk to the public for prices fixed by the Legislature. If the Legislature in this instance can be deemed to have possessed that authority, it must be because this particular case is an exception to the general rule. I suppose the ground upon which an exception would be attempted, is that railroads have often and correctly been said to be public highways. They are so in some sense. They are usually authorized by the state to be constructed, and the power of eminent domain is entrusted to the corporation to enable it to locate and construct the road; but when constructed it is out of the means of a private corporation, which is the owner of the road in the same sense that a private corporation is the owner of a bank. Property acquired by the corporation belongs to it exclusively, and its ownership is as absolute as that of any private individual, of property belonging to him. (The People, Ex. Rel., &c., vs. Batchellor, 53 New York R., 140. Moreover, this fact that a railroad is in some sense a public highway, stops far short of what is necessary in order to lay the foundation for such legislation as is found in this act, because this legislation undertakes to prescribe the prices which shall be paid, not for tolls for passing over the road, but for the service rendered by the corporation as common carriers transporting at its own expense and risk, persons and property from point to point on the road, as well as for receiving and delivering the persons and the property. Now here again there is an element of publicity in the character of the corporation, and of its business. Being common

carriers of persons and property, the law requires them to transact business for all applicants, at reasonable times and for reasonable rates of compensation. But a Railway Corporation when carrying on the business of common carrier at its own expense and risk and for its own profit, cannot be distinguished from any other common carrier, its duties, its liabilities, and its rights are the same, whether they transact the business over a road which they own, or which they hire, or which nature has made for them in the shape of a navigable river, or which the public has built at its expense and thrown open for the common use, and uuless it can successfully be maintained that the Legislature may, by what is in truth a legislative decree, establish for the future prices for personal service and expenditures and risks incurred in rendering it, I am unable to see how this law can be brought within the field of legislation."

It is claimed that the State has the right to fix the tolls to be charged on bridges and ferries, turnpikes, canals and railroads, and that this gives them the right to fix the compensation to be charged by a common carrier by railroad. If this be true, could they not also fix his charges on turnpikes or canals? Where is the difference? Toll is the sum required to be paid by the common carrier or other persons for crossing a bridge, or ferry, or traveling over a turnpike, or for the right to navigate his boat on a canal, but it in no instance includes the compensation to be paid to a common carrier. In fact, it is the tribute paid, mostly by common carriers, to the owners of a bridge, ferry, turnpike,

canal or other like improvement for the privilege of using such improvements in transacting their business as common carriers. It is not a term used to express the compensation to be paid to a common carrier. Applying it to a railroad it would express only the compensation to be paid for the use of the railroad, and that alone. It would not include the compensation to be paid to the company, for discharging the duties and functions of a common carrier, for the labor and services necessarily bestowed, the risks incurred and the expense attendant on the proper transaction of the business. These are the proper duties of a carrier, and for performing which, he would have the same right to charge his compensation, in addition to the tolls paid for the use of the railroad, as he would to charge for like services, in addition to the tolls paid on a canal, turnpike or any other like improvement. The fact that the same company is common carrier and owner of the road, makes no difference. He is entitled to pay for the use of his road, and he is also entitled to his compensation as a carrier. If, therefore, for the sake of the argument, we admit the right of the State to fix the amount of toll to be paid for the use of the road, still it would have no more right to fix the compensation of the company, or its lessee as a common carrier, than it would to prescribe the compensation of all other carriers. Hence granting the right, as to fixing tolls, does not give the State the right to fix the pay of a common carrier, and this law could not be sustained. But the right of the State to fix *tolls* even, arbitrarily after

the improvement has been made, and against the will of the owner, is by no means admitted, and we believe that a careful examination of the cases will show that such fixing of tolls of ferries, bridges, and canals by the Legislature, has, only, been done in the original charter, or in pursuance of some right reserved to fix or prescribe them, and not in violation of vested rights in property.

5th. It is claimed that the furnishing of the means of communication between different localities of a state is a *prerogative right*, and belongs to the state, and that no subject or citizen can establish a road, bridge, ferry, canal or railroad, without the express leave of the ruling authority of the country in which it is to be done, nor charge for the use thereof, or for transporting passengers and freight, without such express license of the state.

If it is meant by this, that the government has the right and power to establish such means of communication, and that it is one of the important ends for which government is established to provide, or cause to be provided, suitable highways of travel and inter-communication between the different parts of a country. We do not dispute it. But, if it is claimed that a citizen or citizens of a state where there is no statute prohibiting it, cannot establish a bridge, ferry road, canal or railroad, and receive pay for its use, the proposition is denied. Suppose that a citizen of Wisconsin should desire to build a bridge across the Wisconsin River, or establish a ferry at any point on it where he owned the land on each side—would there be any legal objection to his doing it? Of course,

he could not obstruct the navigation of the river, but, aside from that, what legal objection could there be to his placing a bridge on his own land across said stream? Or placing a ferry-boat thereon? Who could object? How could he be prevented? Whose rights would be infringed by his so doing? Is there any *prerogative right* vested in the state that would render such acts illegal if there was no statute prohibiting it?

After his bridge was built or his ferry established, would there be any legal objection to his allowing teams to pass over his bridge, or to his transporting them across his ferry? Could he not make a reasonable charge for this service and use, and collect it from those availing themselves of his improvements? If not, why? Could the parties using his bridge or ferry avoid paying a reasonable charge therefor? Or could the state by any proceeding prevent his transacting the business or receiving a reasonable compensation for his services and use of his property? Again, could not a citizen open a road through his own premises, whether one mile or fifty in length, and construct thereon a turnpike for the purposes of travel? And when constructed could he not legally charge a reasonable compensation for its use, to be paid by those who saw fit to use it? And might not this road cross other highways which it intersected in its course? Could not all this be done without any special authority from the state, provided there was no law prohibiting it? I confess that I know of no law that would prevent it. I am aware of many decisions in which the right to establish a bridge or ferry has been drawn in question, and

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where the declaration has been made that the subject could not establish a ferry without the authority of the King, but in all these cases I think it will be found that the controversy was with the owner of another ferry, who claimed that his rights were infringed; or if with the government, it was because some regulation in respect to revenue or license was involved. I know of no law that would prevent such action in this country, nor do I know of any authority by which the state could interfere by an act of legislation, arbitrarily, to fix the compensation to be paid for the use of such improvement below a reasonable amount.

I am aware also that the impression appears to prevail that in order to build, own and operate a railroad, it is necessary to have permission from the Legislature, and that a railroad could not be operated without such authority. I know of no reason why any natural person, if possessed of the requisite means and ability, might not build, own and operate a railroad in the State of Wisconsin, and receive pay for the transportation of freight and passengers It is true that the charters for Railroad Companies always contain provisions authorizing them to build, own, operate and receive pay for transportation of freight and passengers. These provisions are necessary to authorize a corporation to do it but an individual could do all these acts of natural right, the same as he could engage in the business of a common carrier in any other manner.

In the case of Bank vs. Edgerton, 30 Vermont, R. 182 the Court say: "There is indeed nothing in the right of

constructing and operating a railroad, and taking charges for use which is necessarily of a corporate character, or which might not with perfect propriety belong to, or be exercised by natural persons."

And Mr. Justice Allen, now of the Court of Appeals of New York in discussing this question in Beardsley vs. Ontario Bank, 31 Barbour, 625, says: "Aside from the right of eminent domain, which, to a certain extent, and to enable them to acquire the title to real property, is delegated to railroad corporations. I think of no privilege enjoyed by them which might not be exercised by individuals without express permission from the government. Carriage of persons and property by railway is a business open to all who can acquire title to the roadway, and construct and equip the road, and the fact that a railroad, for the purposes to which they are applied, is deemed to be so far public, or for public purposes, as to justify the delegation of this right of acquiring property upon making just compensation to the owner, without his consent, does not affect the character of the property which a Railroad Company may acquire." In Hall vs. The Sullivan Railroad, 22d Law Reporter, 138, Mr. Justice Curtis, says: "But the franchises to build, own, and manage a railroad, and to take tolls thereon, are not necessarily corporate rights; they are capable of existing in, and being enjoyed by natural persons; and there is nothing in their nature inconsistent with their being assignable.

See also Second, Redfield on Railway's, 517 and 570.

Coe vs. Columbia, Piqua & Ind. L. R. Co.. 10th Ohio St. 372.

Any person therefore who could get, or was possessed of sufficient means or ability might, build a railroad anywhere through the State of Wisconsin, where he could secure the necessary grounds and right of way, and could operate such road and carry on the business of a common carrier, without any permission or aid from the law-making power of the state, such property would be private property and the state would have no more right to fix the charges which should be made on it, than it would have have to fix the charges for a line of stage coaches engaged in carrying passengers, or wagoners engaged as carriers of merchandise. Neither a railroad company or an individual can exercise the right of eminent domain except as the state confers it upon one or the other, and this power may be conferred upon one as well as the other. It is now conferred by our law on individuals by the mill-dam act, and it is competent for the Legislature to confer it either on individuals or corporations as the interest of the public may require. And Judge Cooley, p. 538 says:

"Accordingly, on the principle of public benefit, not only the state and its political divisions, but also individual and corporate bodies have been authorized to take private property for the works of public utility, and when duly empowered by the Legislature so to do their private pecuniary interest does not preclude their being regarded as public agencies in respect to the public good

which is sought to be accomplished." Again he says, p. 536. "Although property can only be taken for a public use, and the Legislature must determine in what cases, it has been long determined that it is not essential; the taking should *be to or by the state* itself. If by any other agency in the opinion of the legislature the use can be made equally effectual to the public benefit." Again, on page 537, he says: "Although the practice is not entirely uniform on the subject, the general sentiment is averse to the construction of railways by the state, and the opinion is quite prevalent if not general that they can be better managed, controlled and operated for public benefit in the hands of individuals than by state or municipal agencies." It may be assumed therefore as the settled belief and practice that railroads can be better built, managed, controlled and operated *for the public benefit* in the hands of individuals or private corporations, than by state or municipal officers or agencies. Consequently the wisest and best exercise of the right of eminent domain for that purpose is to commit it to the hands of such individuals or corporations."

I therefore insist that not only might an individual build a railroad without grant or permission of the government, except so far as the power to exercise the right of eminent domain might be necessary, but he might purchase, own and operate any of the railroads now built, and charge for the transportation of freight and passengers without interference or control from the government other than that his charges should be reasonable.

4th. The so called reserved power of the constitution does not autherize the enactment of a law establishing rates to be charged for transportation of freight and passengers.

Section 1 of Article 11, of the constitution of Wisconsin, is as follows: "Corporations without banking "powers or privileges may be formed under general "laws, but shall not be created by special act, except "for municipal purposes, and in cases where, in the "judgment of the Legislature, the objects of the corporation cannot be attained under general laws. All "general laws or special acts enacted under the provisions of this section may be altered or repealed by "the legislature at any time after their passage."

This section relates exclusively to the *formation or creation* of corporations, and provides that it may be done by general laws, and in some cases by special acts, and further provides, that all such general laws or special acts may be altered or repealed at any time after their passage. That is laws *forming or creating* corporations. It is not that all laws relating to or affecting corporations may be altered or repealed, but only those under which they are formed or created. What is the correct construction of this clause? It certainly does not, by its terms, give that unlimited power over corporations, which is claimed by our opponents, but is confined to laws under which corporations are formed or created.

In order to properly understand and construe this clause of the constitution, we must consider, 1st. What

are corporate franchises or privileges? 2d. What was the object to be attained by this provision? 3d. The distinction between corporate property and corporate franchises.

1st. What are corporate franchises or privileges? A corporation is a legal entity, or ideal existence, created by the legislature; an artificial being, clothed with certain franchises or privileges. These franchises are, 1st. Continued or indefinite existence, with perpetual succession of membership. 2d. The right to transact the business for which the corporation is created, in its corporate name. Under our constitution, such artificial beings are created by the legislature, and may be altered or abolished by the legislature at its pleasure, except where rights have become vested, or the alteration would violate some portion of the constitution, either state or federal. Without the clause above quoted, the power to create would have belonged to the legislature, the same as now, but not the power to alter or abolish. Natural persons always form or constitute the corporation. It is a franchise granted to a certain number or society of individuals, and the business to be carried on is in fact their business, and by organizing the corporation, they are authorized and enabled to transact it in the name of the corporation. These two are the essential franchises necessary to their creation or formation as coporations. Other powers or franchises are conferred upon corporations, such as the power to exercise the right of eminent domain, but they are not essentially or necessarily corporate rights, and may with equal pro-

priety be conferred upon and exercised by natural persons as by corporations. I am not aware of any business transacted, or authorized to be transacted, by a corporation, except, perhaps, issuing currency, which natural persons might not do as a matter of right without statutory authority. It is not necessary that any business carried on by corporations should be so conducted. It might all be done by natural persons, and as of their own right.

But it is more convenient, and in many cases practically necessary, that certain kinds of business and certain enterprises should be carried on by corporations, in order that there may be no change of interest by death, and that the several parties may have their interests represented by stock in an available shape.

What, then, are corporate powers which the Legislature may alter or repeal, without invading the inviolatability of private property? Many individuals desire to associate together in a work requiring a large amount of capital, and they prefer to act and conduct such business in an artificial name,—to purchase and hold property by that name,—to issue certificates of stock to the owners of such property, according to the amount of capital each individual has invested in the enterprise. The sole object of those who invest their capital in such business, is private gain or emolument. The State grants this privilege, and this is the franchise of the corporation. It is simply a grant of authority from the State to its citizens, to conduct certain specified business, by an artificial or corporate name. These are franchises that

the State may alter or repeal, and when they are repealed, the parties who form the corporation will own the corporate property and hold it in the corporate name, as before the repeal, and will manage it, and operate and enjoy it, as tenants in common.

Bacon et al., vs. Robertson, 18 Howard, 480.

I am aware that it is claimed that this reserved power extends far beyond these bounds, and reaches every right, power, and grant given to or possessed by corporations and to the utter destruction not only of the corporation, but of all beneficial use of its property. This claim will be examined hereafter.

2d. What was the object to be obtained by inserting this provision in the constitution? The decision of the courts had settled the law, that a charter for a corporation granting corporate privileges was a contract with the State, and irrepealable and unalterable by subsequent legislation. This provision was for the purpose of bringing such laws under the control of the Legislature, the same as all other acts of the Legislature. It was not intended thereby to give the Legislature any control over the property of individuals or corporations, not otherwise possessed, but simply, power to deal with the charter of a company in the same manner that they could with any other law passed by a prior Legislature. The rights of property were not disturbed by this reservation. No affirmative power is given by this provision. It is only a reservation of the power which the Legislature possessed before and at the time of granting the charter. If before granting the charter it had the right

to fix and determine the prices that should be paid for property or its use, or the compensation to be paid individuals for services rendered or risks incurred, it retains it as to the corporation created. It is not estopped to exercise it by the charter granted. But if no such right existed previously, it is not created by this reserved power, and cannot be exercised under it. In other words, it operates to relieve the Legislature from a restriction upon their power, which would otherwise have attached as to corporate franchises, but granted to them no additional authority beyond what they already possessed as to all natural persons in the disposition and enjoyment of property. Without this reservation of power, the charter of an incorporated company could not be altered. Laws that might be passed as respects an individual, carrying on particular business, could not have been passed in respect to a corporation carrying on the same business. That is, the Legislature now has the same power over the business and property of corporations that it has over individuals, but nothing more. No additional power beyond this is granted by it.

3d. The distinctions between corporate franchises and corporate property:

It is true that corporate franchises may be said to be a species of property and are of value; but they are entirely distinct from what is ordinarily understood by the property of the corporation, or shareholders. No modification or repeal of the corporate franchises, under which corporators have purchased and hold property, can invade or impair any estate or vested right of the

corporators in such property, and on the repeal of their charter, it would remain the property of the corporators, to be used by them according to the original design and purpose for which it was created. It must be apparent to all, that the State should not, and cannot recall any more rights or privileges than it has granted. Whatever other rights the corporation has acquired, are as inviolate as those of natural citizens. Property owned by an incorporated company is just as sacred as if owned by a natural person. It cannot be taken for public use or confiscated by legislation any more than the property of natural persons. Hence while the Legislature has reserved the right to alter or repeal the chartered rights of corporate companies, it has no greater power over their property than over that of other persons. And Judge Swan, in his pamphlet on this subject, says:

"And now it seems necessary to reiterate distintly and emphatically that a railroad, with its rolling stock, buildings, shops, fixtures, and other property pertaining to it, and its uses as property for emolument, is not the artificial being called a corporation, not corporate powers, but property, private property, just as truly so, with the incidents and vested rights of property, as the site, building and furniture of an incorporated hotel. Both as private property, are inviolate, whatever may become of the artificial corporate powers which the private owners as corporaters have obtained from the Legislature. It is doubtless within the power of the Legislature under the constitution of Wisconsin to repeal all laws, general or special, authorizing the formation of

corporations, and perhaps put an end to all corporate existence. Whether such repeal would have that effect on existing corporations formed under general laws, may be questioned. The Supreme Court of Iowa, in

held that the repeal of a general law authorizing the formation of

did not have the effect to terminate the existence of corporations organized under it. But granting that such repeal would put an end to all existing corporations, would it have any effect upon their property? It would not revert to the State, but would remain the property of the shareholders as at present, and in the same proportion, and they alone would have the right to manage and conduct it. Such repeal would in no manner change the property or its use. Instead of being owned by the shareholders in their corporate name as a corporation, it would be owned by them as tenants in common and managed as a partnership in the corporate name or any other that they might elect to assume. In that case the *reserved power* so called, certainly could not be invoked as authority for the Legislature to fix the rates of compensation to be paid for the use of the property or the services of the partners in transacting the business. The reserved power would end with the corporate existence. Its entire force would be spent in effecting the repeal. It could exercise no power over the property or the services of its owners. Hence we insist that this power gives no authority to the legisla-

ture to fix the compensation to be paid for the use of the property of the corporation, or for transacting the business of a common carrier in connection with it.

Suppose instead of a repeal of the charter that the company as they were authorized to do should have leased its road for a term of years to an individual, who was engaged in operating the same as a common carrier, at the time of the passage of this law, would this *reserved power* operate upon him so as to authorize the Legislature to fix his compensation for transacting the business of a common carrier? If so would it release him from paying the stipulated rent, which he could afford to pay when the lease was made, but which could not be earned under the provisions of chapter 273.

This reserved power is the same as to all corporations of the state. Hence, if it gives the right to fix a tariff of rates for the railroads, upon which they are to do business, it also reaches all other corporations of the state, and empowers the Legislature to fix the price at which their services must be rendered, their business transacted, and their products disposed of. It would give them power to fix the rates at which life insurance companies should take risks on lives; at which fire and marine companies should insure our buildings, our property, and our vessels and their cargoes; at which the rolling mill should sell its rails, and re-roll old rails; the price at which our leading newspapers should furnish their several issues and do their advertising; at which the Park Hotel, and other similarly situated hotels,

should furnish their accommodations; at which the gas companies shall furnish the gas; and the lumber companies their lumber; and last, but not least, the price at which Best's Brewing Company and other brewers operating under charters, shall furnish their lager. Even the modern institution called the grange, when incorporated, may be subjected to this supervising power of the Legislature, and compelled to dispose of the goods of the grange store, and the agricultural products of the farm, at such prices as the law-making power shall establish.

By the construction which the Attorney General of Wisconsin and his associates give to this reservation, not only all the above corporations, but all the others in the state, will be subjected to the control of the Legislature, in fixing and determining the price, not only, for the use of their corporate property, but also for their services and commodities. The present law has only fallen upon railroad, express and telegraph companies—but let this be sustained, and who can tell what particular class of corporations will next become obnoxious to the Legislature? or how ruinous the next scale of prices may be, not only to railroad companies, but to all others, whether engaged in the business of common carriers, insurance, manufactures, or any other industrial pursuits? The opinion of the Attorney General furnished the Governor on this subject includes them all; and if, by virtue of this power to alter or repeal, the Legislature can fix the charges of railroad companies, they can also fix the price of flour manufactured by a milling company, and the price at which cloth shall be sold by the factories. The spectacle

would be presented of two factories, one owned by an individual, the other by a corporation, both engaged in the same business, yet one would be allowed to fix his own prices, while the prices at which the other should sell its goods would be prescribed by the Legislature. It was claimed in the court below that this result would not follow for the reason that the miller or manufacturer would not be compelled to submit to the terms imposed by the Legislature, as he could abandon his corporate existence and conduct his business in his individual character. This we insist, also, might be done by the owners of the railroad; *first;* on the principal of natural right already discussed, and *second;* on the ground hereafter stated that the right to own and operate a railroad inheres in the property, by virtue of the acceptance of the charter and the construction of the road, and that the repeal of the corporate franchises will not divest the owners of this right. This view will be considered hereafter in this argument. But, is not the reason here given for the difference, really an admission by our opponents, that the reserved power, does not give them a right to fix our compensation. It is an admission on their part that their pretended right to fix compensation, is only effectual where they possess the power to destroy the business by killing the corporation. But if the business can live after the corporation is dead, they admit they are without power to fix rates. In other words, it is simply saying to the railroad companies, we have the power to destroy you and will do it unless, you submit to such rates as we prescribe.

IV.

This power reserved in the constitution of Wisconsin, to alter and repeal laws creating corporations is not without limit.

It is well settled that this power of alteration is not an arbitrary and unlimited power. The power to repeal, and thus put an end to the corporators' right to conduct their business in their corporate name, is admitted. That is a mere privilege granted to natural persons, and may be withdrawn, and the corporators would then be left to conduct their business in their own names, as other natural persons conduct theirs. But the right to alter, or, in other words, the right to prescribe the manner in which the corporation shall conduct its business and use its property, is limited. This matter has frequently been before our courts; and while the exact limits of this power may not have been definitely prescribed in all cases, it is distinctly settled by all the courts that have passed upon it, except the Supreme Court of Wisconsin, that there are limits to its exercise, and that it must be exercised in subordination to the provisions of the constitution of the United States, and in harmony with the other provisions of the constitution of Wisconsin; that vested rights cannot be disturbed, nor can the company be deprived of its property, or the use thereof, acquired under a legitimate construction of the powers granted in the charter.

It matters not whether this reserved power is contained in the charter, a general law, or the constitution. It is

equally operative in the one case as the other, and the construction and effect the same.

1st. *This provision does not dominate the other provisions of the constitution. It has no superiority over them, and must be construed in harmony with them, and in subordination to the federal constitution.*

The discussions of this subject have appeared to assume that this provision was superior to all others, and that it has been construed as if it stood alone, unlimited by any other clause of the constitution. Chief Justice Ryan, speaking of this power, says, "This power is limited by its own words only. Any limitation of it must come from those word." I need not say that such is not the fact.

Section 1 of Article 14 of the amendments to the constitution of the United States provides that "No state "shall make or enforce any law which shall abridge the "privileges or immunities of citizens of the United States, "nor shall any state deprive any person of life, liberty or "property, without due process of law."

The constitution of Wisconsin provides that "the prop- "erty of no person shall be taken for public use without "just compensation therefor." (Sec. 13, Art. 1.)

"The right of trial by jury shall remain inviolate." (Section 5, Article 1.)

"Writs of error shall never be prohibited by law." (Section 21, Article 1.)

"Every person is entitled to a certain remedy in the laws, for all injuries and wrongs, which he may receive

in his person, property or character." (Section 9, Article 1.)

All these provisions of the constitution of Wisconsin are of equal force and potency. In order to test this question, let us suppose that said chapter 273 had in addition to its other provisions, enacted that in any suit brought under its provisions, the railroad company should not be entitled to a jury trial, or that its employes should not be entitled to a writ of error on conviction under it. Could such enactments have been sustained under this *reserved power* of the constituion? Of course not. But why not? Simply because the proposed alteration would be in conflict with the other parts of the same constitution. It is therefore necessary to construe these clauses together. Let us place them in apposition and see how they will read. "All general laws or special acts enacted under the provisions of this section may be altered or repealed by the Legislature at any time after their passage, *provided* "that such alteration shall not impair the right of trial by jury," or "the right to a writ of error." Again, such laws may be altered or repealed *provided*, That thereby "The prop- "erty of no person shall be taken for public use, "without just compensation therefor," or "*provided*, that "thereby no person shall be deprived of life, liberty or "property without due process of law, or his privil- "edges or immunities abridged."

We have already shown that by this law priviledges and immunities as American citizens have been abridged, in that, we are not allowed to fix the compensation for our services which we are compelled to

render. That we are deprived of our property, without due process of law, in that, we are compelled to suffer its use, for an inadequate compensation. That our property has been taken for an alleged public use or benefit without just compensation. In that, we are compelled to furnish our property and services for the benfit of the public, for less than a reasonable or fair remuneration. These facts stand admitted upon the record in this case.

1st. That the compensation allowed by Chapter 273, is not a reasonable or adequate compensation for the use of the property and the services required.

2d. That it compels the owners of the railroads to perform all services that may be required of them, in the transportation of freight and passengers, for an inadequate and insufficient compensation, against their will.

3d That it enforces the performance of these duties by penalties and fines against the company, and by criminal prosecutions and imprisonment against its employes.

4th. That it actually deprives the owners of all beneficial use of their property, and takes from them one million of dollars per annum, which, but for this law, they would have rightfully and properly received for the use of their property and the transaction of their business.

Can it be pretended that such an act is not an abridgment of the privileges and immunities of citizens of the Uuited States? Does it not deprive them, not only, of their property, but of their liberty even, without due process of law? The sole pretence on the part of the

Legislature for the passage of such an act is the public benefit, but it is a benefit conferred only by taking our private property. It is, therefore, a taking of private property for public use, without any compensation, and in violation of just as plain and imperative a provision of the constitution, as that which declares that "the right of trial by jury shall remain inviolate," or that "writs of error shall never be prohibited by law." This court cannot hold, that the Legislature are at liberty to disregard the 13th section, but not the 5th and 21st, of article one, of the constitution of Wisconsin, in order to give full force and unlimited power to section 1 of article 11, of the same instrument. The time may come when the 5th section, even, may be invoked in aid of the rights of corporations, and the 21st is now, one of their most reliable safe guards. All of these sections must be construed together, so as to give each its proper force and effect, and each one is limited by the others. While section 1 of article 14, of the amendments of the constitution of the United States, is supreme over all the provisions of the constitution of Wisconsin, and they must bow to *its* mandate. Hence the *reserved power*, cannot be so used as "to abridge the privileges and immuuites of citizens of the United States or to deprive any person of life, liberty or property without due process of law."

2d. *Vested rights cannot be disturbed, in virtue of this reserved power.*

I am not aware that it is claimed by the advocates of this power, that vested rights can be disturbed by

legislation. But they claim that no rights can become vested, in a corporation, or in favor of it, where the *reserved power* exists. It is claimed that in such a case a charter from the State is not a contract, but a sort of license, revocable at pleasure, and that no rights as against the State, and in favor of the corporation can ever exist. The full meaning of which, is that it is not competent for the State to make a valid contract with one of its corporations, so that it could be enforced against the State, against its will; but that the Legislature, would have full authority, at any time, to put an end to the corporation and the contract, or to alter its terms by a law, altering the terms of its existence. In other words, that the State may, at all times, plead its *minority* in avoidance of all contracts made with chartered companies, notwithstanding that the corporation has fully performed its part of the agreement. The whole doctrine in reference to executed contracts, and the rights acruing to the contracting parties therefrom, is wholly ignored. Corporators who have performed all the conditions of their charter contract with the State, in the estimation of our opponents, have acquired no right which the Legislature, in the exercise of this *reserved power*, is under any obligation to respect.

It is admitted that the contract entered into by the state with the corporators, so far as it relates to the formation of the corporation, its existence, and the manner of conducting the corporate affairs, is subject to alteration or repeal at the pleasure of the Legislature. But so far as it relates to the property of the share-

holders, to be managed by the corporation, there *is* a contract which is irrepealable, and which protects the property from interference and invasion by the Legislature, just as effectually as the private property of an individual. This right of property, and its enjoyment and use, in the manner prescribed by the charter, becomes vested in the corporators, and cannot be disturbed by any legislative act. For instance, the Legislature grants to certain individuals the franchise to be a corporation, and to transact business in the corporate name; and they are further empowered, in that corporate name, to construct and operate a railroad, and charge for the transportation of freight and passengers such rates as they may deem just and proper. The corporators accept the franchise granted, and form the corporation, construct the railroad, and engage in the business of transportation. The Legislature may at its pleasure annul the grant to exist as a corporation, or change its organization or the management of its corporate affairs, but it cannot interfere with the railroad, or deprive the corporators of its ownership, or the right to use and control it in the manner, and for the uses and purposes specified in the original grant. The rights of the corporators in the property is a vested right, that cannot be disturbed by any legislative action, and the right to use, control and fix, and charge compensation for its use, inheres in the property, and is vested in the corporators just as absolutely as the right to any property vests in any individual.

The Legislature of Wisconsin, granted to the original corporators, the franchise to form a corporation, to use a

corporate name, and to construct or purchase and operate a railroad, and to charge such rates of compensation for the transportation of freight and passengers as they should from time to time fix and establish. This was a proposal on the part of the State to the corporators. The acceptance of this proposal by the corporators, changed it into an executory contract between the State and the corporators. By the subsequent construction and equipment of the road by the corporators, it became an executed contract, and the right to the compensation, to the enjoyment of the use and profits of their property, within the limits of the executed contract, passed from contract to grant. "The charter fixed and determined, between the State and the owners of the property, the terms and rights of enjoyment of the property, which are inseparable from, because they constitute a part of, the estate in the property; and, therefore, any substantial invasion afterwards, by the Legislature of the enjoyment of the estate and vested rights therein, would be an impairment of the obligations of a contract, the violation of an estate in property, and retroactive legislation."

We admit the power of the state over the corporation, but not over the property. In that the shareholders have a vested right of property, which no legislation under the *reserved power* relative to corporations, can in any manner affect.

The State, by the charter, expressly granted to the corporators the right to fix and establish their own tariff of charges for the transportation of freight and passengers. On the faith and credit of the

State, thus pledged, the corporators made the necessary investment and constructed the road, and in all things performed the contract on their part, relying on the faith of the State so solemnly pledged. Among honorable men such a provision would never be displaced by a tariff of rates prescribed by a Legislature, after the expenditure had been made. The companies trusted to the charter as made, and have expended their money and completed the roads. But to their surprise and injury, the contract is now repudiated under circumstances, that, as between individuals would be characterized as little better than obtaining property under false pretences.

"If the Legislature intended that after citizens had embarked their private fortunes in one of these gigantic enterprises on the faith of this prescribed right of enjoyment, all the estate and ownership in it that was of any value as property was left to the caprice of the majority of the Legislature at each session, and with the power to reconsider what estate the corporators should hold and enjoy in their private property, the Legislature should have expressly reserved such power of invasion of property; and had they reserved it, without limitation upon their future action, I will venture the assertion that no railroads would have been constructed under it." By this act the State is now attempting to repudiate its solemn contract, and its plighted faith, and, arbitrarily, to fix a rate of compensation in violation of both, which is manifestly unjust and admitted to be wholly inadequate.

By a general law of the State of Wisconsin, approved October 10th, 1856, (Session Laws, page 213,) and afterwards incorporated into the revised statutes of 1858, (Sections 33 to 38, inclusive of Chapter 79.) It was provided that any railroad company might borrow money and as security therefor, pledge by way of mortgage or trust deed, their railroad track, right of way, depot grounds, rights, privileges, franchises, immunities, and appurtenances, and that on a foreclosure and sale thereof, the party or parties acquiring title under such sale, and their associates successors and assigns should have and acquire thereby, and should receive and enjoy thereafter, all and the same rights, privileges, grants, franchises, immunities and advantages in and by said mortgage or trust deed enumerated and conveyed, which belonged to and were enjoyed by the company, making such deed or mortgage, or contracting such debt as fully and absolutely in all respects as the corporators, shareholders, officers and agents of such company might or could have done therefor, had not such sale or purchase taken place, such purchaser or purchasers, their associates, successors or assignees might proceed to organize anew, and elect directors, distribute and dispose of stock, take the same or another name and might conduct their business generally under and in the manner provided in the charter of such railroad company with such variations in manner and form of organization as their altered circumstances and better convenience might seem to require: *provided, however*, that no greater or enlarged powers should be exercised by the new organization than were conferred by

the charter of said company. Many of the charters also contain express provisions authorizing a lease or voluntary sale by the companies of their railroad and its appur tenances, as in the case of the La Crosse and Milwaukee charter now forming a part of the Chicago, Milwaukee and St. Paul Railway Company.

Let us now consider the effect of these provisions and the acts thereby authorized, with respect to the operation of this *reserved power* upon the property, as claimed by the counsel opposed. It is said that by virtue of this *reserved power*, the Legislature may at any time repeal the charter, and thereby put an end, not only to the corporation, but also to the franchise to operate the road, and thus render the property practically worthless.

Of course, such an exercise of the *reserved power*, with such consequences, would be justified only on the ground that the public benefit required it. If so, the logical sequence would seem to be, that the State should pay the owners for the property thus taken or destroyed, and, under the provisions of the constitution already cited, this court would be bound to hold any law effecting such a result unconstitutional and void, unless accompanied with provisions for ascertaining and paying for the property thus destroyed.

But it is denied that any such consequence could or would result from the repeal of the charter. The grant to build, own and operate a railroad, in the case at bar, by the State of Wisconsin, was to the Madison and Beloit Railroad Company. Its name was subsequently changed to the Rock River Valley Union Railroad Company.

This company mortgaged its road and franchises under the provisions of the statute above cited. The mortgage was foreclosed, and the purchasers formed and organized the Chicago, St. Paul and Fond du Lac Railroad Com pany. This company also mortgaged its line of road and franchises, which was foreclosed and sold, and the purchasers formed and organized the present company, the Chicago and Northwestern Railway Company. The Madison and Beloit Railroad Company, and the Chicago, St. Paul and Fond du Lac Railroad Company, have long since ceased to exist as corporations, but their road, which was once their property, is an existing fact—is an estate owned by the Chicago and Northwestern Railway Company, and which it now operates by virtue of the franchise originally granted to the Madison and Beloit Railroad Company. No other franchise has ever been granted for that purpose. But the original one has been transmuted, through all these various changes to the present company, as a part of the property authorized to be mortgaged and conveyed. Great numbers of persons, on the faith and credit of the legislation of the state, have invested their fortunes in the bonds issued by these several companies, and in the stock of the present company, relying for a return to that investment on the road constructed with the franchise to be operated in accordance with the original grant upon which it was built and has been transferred to its present owners. Nearly the whole value of the property consists in this franchise to operate the road in pursuance of the original grant. Yet, it is contended, that the Legislature, by the repeal of the charter granted to

the Madison and Beloit Railroad Company, a corporation which long since ceased to exist for any purpose, would thereby repeal all right which the present company has to operate said road, and practically destroy the whole property. The doctrine is monstrous, and we deny it *in toto*, and insist that the right granted by the state to build, own, run and operate this road for the transportation of freight and passengers, for hire, according to the original grant, is a franchise and right that inheres in the property, and is irrepealable and indestructible, and that it belongs to the owners of the property as a vested right in the property, and cannot be disturbed by the action of the Legislature under the *reserved power*, or in any other manner. That it is not affected by the repeal of the original charter; nor would it be by the repeal of the charter of the present company, for it would then exist in the shareholders as the owners of the property, and as a part thereof.

What was it that our Legislature intended should be mortgaged, by the law above quoted, or sold by voluntary sale when authorized? Was it a railroad without the right to operate or use it? or was it a road possessing franchises to be operated and used according to the grant under which it was built? Certainly the latter. Any other construction would operate as a fraud, and a cheat upon the purchaser. The original company could exist without its property; so, too, it could die, without destroying the property.

City of Bridgeport vs. N. Y., N. Haven R. R., 36 Conn., 266.

Coe va. Columbus, &c., 10 Ohio State, 374.
Atkinson vs. Marietta, &c., R. R., 15 Ohio State, 36.

But it is answered that the bondhoders and all other parties, took their interest and made their investment in this property with full knowledge of the *reserved power*. It its true they took it with knowledge of the provisions of the constitution and of all those provisions. But not with knowledge of such a construction as is now attempted. No ordinary foresight could guard against *such* an exercise of such a power. And if such a construction of this power is possible, then we say,

> "O, it is excellent to have a giant's strength: but it is tyranous
> To use it like a giant."

We insist that on the sale of a railroad by the owner, all the estate as above described, with the full right to fix the compensation for its use and enjoyment would pass to the purchaser, regardless of what might be the fate of the particular corporation that constructed it. The *reserved power*, may have been exercised to its full extent, by the repeal of the charter of such original company. Yet the property would survive, endowed with all its original capacity, and attributes, which would inhere to it as property, and the new owner would have the same right to use, operate and enjoy it that was granted to the original corporators.

Coe vs. Columbus, Piqua, Ind. R. R. Co., 10 Ohio State, 373-386.

Hall vs. Sullivan R. R. Co., 22 Law Rep. 138 to 140 Redfield, 571.

Bank of Middlebury vs. Edgerton 30, Vermont 182 to 190.

In all cases of the transfer of railroads, whether by voluntary conveyance, or by operation of law, the right to make profit of the use of the railroad is so connected with the real estate of the corporators, that by and with the sale and transfer of the roadway, the right of the original company to take compensation passes to the purchaser, unaffected by the fate of the original company. And if by the original charter, any limitations or restrictions were imposed upon this right, they inhere in the property, and control it in the hands of the new purchaser.

Commonwealth vs. Canal Co., 66, Pa. 41.

Atkinson, et. al. vs. Marietta R. R. Co., 15, Ohio State 36.

Johnson vs. Hamilton, 23 Ohio State, 168 to 187.

Commonwealth vs. Central Pass. Ry., 52, Pa. 506.

Phil. & Wilm. R. R. Co. vs. Maryland, 10 How. 376.

Under the laws of Massachusetts, since 1831, all acts of incorporation are "at all times subject to amendment, alteration or repeal, at the pleasure of the Legislature," yet the courts have uniformly held that this power has some limits. In Commonwealth vs. Essex Co., 13 Gray,

p. 253, this question came before the Supreme Court of Massachusetts. The case was an indictment against the Essex Company for neglecting to make and maintain around their dam across the Merrimac River at Lawrence, a suitable and sufficient fish way for the usual and unobstructed passage of fish. The company had built fish ways in accordance with the terms of the charter, and had settled certain claims for damage of some of the owners of the fisheries, as required by their charter in 1847-8. Subsequently the Legislature passed an act in 1856, requiring the company to build further fish-ways, and the indictment was for the neglect of the company to comply with its terms. Chief Justice Shaw delivered the opinion of the court, and held the law null and void as in violation of vested rights and said in reference to this reserved power: "It seems to us that this power should have some limit, though it is difficult to define it. Perhaps the true rule is this: That where under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted."

In Commissioners, &c., vs. Holyoke, &c., 104 Mass., p. 451, it is held that the law does not reserve to the legislature authority to so alter or amend a charter as to defeat or substantially impair the object of the grant, or any rigbts which have vested under it.

The same principle is recognized in Kentucky: "A reservation in a legislative charter of the power to

alter, amend or repeal, does not imply the power to alter the vested rights acquired by the corporators under the charter, and to add new parties and managers without the consent of the corporators."

In this case, the Legislature incorporated the Western Baptist Theological Institute, making Cave Johnson and six others corporators, and the board of trustees was fixed at thirty-six. The last section of the charter declared that any future legislature might alter, amend or repeal the act whenever they might think right or proper to do so. Subsequently, in 1848, the Legislature passed an amendatory act, increasing the number of trustees to fifty-two, and appointing sixteen new trustees, and appointed by name the sixteen additional trustees, and required that all trustees thereafter appointed should be citizens of Kentucky. The court held the amendment unauthorized, and say:

"In our opinion the act of the Legislature creating sixteen new trustees, without the consent of the board, is not an act coming within the scope and meaning of the power reserved in the act. As it seems to us, the passage of this act was not so much the exercise of a legislative function as it was the exercise of the ministerial functions pertaining exclusively to the board of trustees. It is an act not changing or amending the mode or manner in which the trustees to whom had been given by the founder of the charity, the supervision and visitorial power of the institute, but it is an act by which this supervision and visitorial power is substantially taken away and conferred upon others. True, the Legislature

may, by virtue of the reservation, repeal or destroy, but the power to destroy does not imply a right to cripple or to maim."

In Allen vs. McKeon, 1 Sumner, 276, Judge Story quotes the reserved power of the charter as follows: "the legislature may grant further powers to, or limit, annul, or restrain any of the powers by this act vested with the corporation, as shall be judged necessary to promote the best interests of the college," and then says, "whatever it may do, then, must be done to promote the best interest of the college. It is true, that it is constituted the sole judge. What is the best interest of the college, but still it cannot do anything pointedly destructive of that interest. Its authority is confined to the enlarging, altering, annuling or restraining of the *powers* of the corporation. It cannot intermeddle with its *property*."

In Miller vs. State, 15 Wallace, 478, the same question was presented. The case arose in the State of New York, and after judgment in the Court of Appeals, went to the Federal Court on error, upon a question involving the constitutionality of an act of the Legislature. In New York there was the same constitutional reservations relative to incorporations as in Wisconsin. One of the judges of the State Court, in defining the extent of such reserved powers, uses the following language: "The Legislature which creates the artificial body must necessarily have power to prescribe the organs through which it shall act. But this is a different thing from arbitrarily taking possession of the corporation itself, and through it the property of the parties for whose benefit the corporation was

created. They cannot be presumed to have anticipated tnat a charter giving them the privilege of managing their property, for their own benefit, in a certain way, could be transferred by this reserved power of amendment into a vehicle which should transfer from them to the state or its appointees all control over the property which they have invested in the corporate enterprise. To hold such a doctrine would be to place all property invested in corporate enterprises beyond the pale of the protection of the federal constitution. Such an act would approach nearer to one of confiscation than of legislation."

Has the Legislature of Wisconsin attempted less than this?

On page 498, 15 Wallace, Mr. Justice Clifford says: "Power to legislate, founded on such reservation in a charter to a private corporation is certainly not without limit, and it may well be admitted that it cannot be exercised to take away or destroy rights acquired by virtue of such a charter, and which by a legitimate use of the powers granted have become vested in the corporation."

In 21 Grattan, 593, the Court hold the power is limited, and that the corporation cannot be forced to accept the amendment, but may cease to do business as a corporation. In Miller vs. N. Y. and Erie R. R., 21 Barbour, 513, the Court held that an act requiring the company to give the land and make a road across the track was unconstitutional, as depriving the company of its property without compensation.

The same doctrine was held in 66 Penn., 41. In Commonwealth vs. Canal Company. See also Cooley's Constitutional Limitations, 577 and 8.

Such a reservation will not warrant the Legislature in passing laws to change the control of an institution from one religious sect to another, or to divert the fund of the donors to any new use, inconsistent with the intent and purpose of the charter, or to compel subscribers of stock, whose subscription is conditional, to waive any of the conditions of their contract.

Zabriskie vs. Railroad Co., 3 C. E. Green, 180.

Railroad vs. Veazie, 39 Maine, 587.

3d. *Nor can the company be deprived of its property, or the benefit thereof, acquired under a legitimate use of the exercise of the powers granted by the charter.*

It has already been shown that for the state to take the property of a corporation for the public benefit, under a pretended exercise of this reserved power, without making just compensation, would be in violation of Section 13. Article 1, of the constitution.

That to deprive the corporation of its property, without due process of law, would be in violation of Section 1, Article 14, of the amendments to the constitution of the United States.

It has also been shown that the effect of this law is to deprive the company of thirty per cent. of its gross earnings, amounting to at least one million of dollars per annum. The whole amount of the net revenue of the road in Wisconsin, and that the only value of a road to its owners is to

produce net revenue. Therefore, it is clear, that this law does for the time being, deprive the owners of all beneficial use of their property, which is a taking or depriving them of their property. But it is claimed that this taking of the beneficial use of the property, and depriving the owner of all income therefrom, is not a taking of the property, or depriving the owner of it. Chief Justice Ryan says:

"It was said that chapter 273 violates the rights of property of these defendants. We cannot perceive that it does. Whether it will lessen the income of their property, we cannot foresee. We only know that it does lessen their rates of toll. But it does not wrongfully touch their property. As far as the franchise is to be considered property, it was subject to this very limitation, and the limitation is the exercise of a right over it, which does not violate it. The right of limitation entered into the property, and qualified it And the act does not at all meddle with the material property, distinct from the franchise. It acts only on the franchise, not at all upon the material property. And it is sufficient to say that they acquired the material property, as distinct from the franchise, subject to the alteration of the franchise under the reserved power. That was a condition under which they chose to hold their property, and they have no right to complain when the condition is enforced. Their rights in their material property are inviolate, and shall never be violated with the sanction of this court. But they are no more violated by this act, and its enforcement than by foreclosure of a mortgage or ejectment by paramount

title. It is a right over property which is enforced, not a wrong to right in property." (Page 35 of opinion.)

That is, the Chief Justice does see that it lessens the amount to be paid for use and services thirty per cent., yet he does not know that it will decrease their income. He knows that experts, skilled in the operation of the road, have testified that it would decrease the income of the road, and render it valueless to the owners, and there is no evidence to contradict it. Yet he does not *know* that it will render the property less valuable to the owners, and insists that so long as the law does not authorize a manual touching of the dirt, wood and iron constituting the road, the property is not interfered with. The fact, that we actually are, or may be, deprived of all right or ability to use it or enjoy it by this action of the Legislature, is not an interference with the property in the estimation of the Chief Justice.

It is submitted however, that to any ordinary mind, not a Chief Justice, it is entirely clear that the property may be interfered with and utterly ruined, and its value substantially destroyed, without manual interference with the material property and without ousting the owners therefrom. If, as it is claimed, the road can only be operated in virtue of the franchise granted, and that franchise does not inhere in the property, so as to be irrepealable, and such repeal can be effected in virtue of the *reserved power*; then most assuredly Section 1, of Article 11, of the constitution does dominate all other provisions of that instrument, and while overriding the vested rights of the owners of this property also

overrides the provisions of the constitution of the United States. If the Legislature were authorized to pass Chapter 273, they are equally authorized in the coming session to pass another act, taking away all right to compensation, and still compel the company to continue to operate its road under pains and penalties of new fines and imprisonment. They were not bound to stop at thirty per cent., they could by the same authority, have taken fifty per cent, or the whole. If they had the right to take thirty per cent. of our earnings, there could be no limit to their action, and if the doctrine laid down by the Chief Justice is correct, they would not have interfered with our property, when they had deprived us of all right to compensation. Our material property would still remain and our vested rights would not have been disturbed.

The Chief Justice says, "the reserved power in our constitution is a positive provision, entering into all charters under it." This is admitted as to all matters relating to their creation or formation, as corporations and their existence as such. But the right to build, own, and operate a railroad, whether it be held a natural right or a franchise granted by the State, is not a corporate right, pertaining or relating to the creation or formation of a corporation. If a franchise, it may be granted to an individual or to individuals as well as to a corporation, and when granted to either, and accepted and acted upon on the faith and credit of the State, and an investment made that cannot be withdrawn, and can only be used and made available through a continuance

of the franchise, it needs no argument to demonstrate that a withdrawal of or prohibition to use the franchise operates just as effectually to destroy the property as it would for the State to withdraw from the owners the material part of the property, or prohibit its use by them, and this is equally true whether the grant is made in the first instance to a corporation or to an individual.

There is no doubt that the Legislature might grant this franchise to build, own or operate a railroad to an individual or to individuals, without an act of incorporation, and that on such a grant they might build and operate a railroad. There is just as little doubt that after they had constructed their road, their rights thereto, with all its privileges, would become vested rights, of which they could not be divested by an act of the Legislature. Now, in the case of the La Crosse and Milwaukee Railroad Company, the State of Wisconsin created that Company, and authorized it to build, own and operate a railroad from Milwaukee to La Crosse, and also authorized said company, at its discretion, to mortgage, lease or sell its road, when constructed, with all its rights and franchises, and that the purchaser or lessee should, on a sale or lease, take all its rights and franchises. That road was afterwards sold on a decree of the United States Court, entered on a mortgage given by said company, and at the sale was purchased by Pratt & White, and the sale duly confirmed. Now what title did they get by by that purchase? Did they not get precisely the same title to that road and its franchises, to own and operate it according to the grant originally made to the La Crosse

Company, that they would have had, had the state made the original grant, to build, own and operate that road, to said Pratt & White, and they had constructed the road under such grant? Did not the title to said property, including the franchise to operate it as a railroad, according to the original grant, become vested in them as an estate, of which they could not be divested, except by due process of law?

It is true that the Chief Justice of Wisconsin denounces this position as "a mere *petitio principii*, and hardly worthy of notice," yet it is modestly submitted to this honorable court as worthy of their consideration.

Again the Chief Justice says (page 35 of opinion):

"Of the same type is the argument that Chapter 273 violates the contracts of these defendants with their creditors. This position appears to us to rest in the absurdity that the mortgagor can vest in his mortgagee a greater estate than he had himself. Perhaps the statute may lessen the means of payment of the defendants. So would a fine for homicide, under the police power of the State. But to lessen the means of payment of a contract is not to impair the obligation of the contract. These defendants took their franchises, and their corporators invested their money, subject to the reserved power, and suffer no legal wrong when that is exercised."

Is it not also true, that every creditor trusts his debtor with full knowledge that the state possesses the reserved power, at any time its sees fit, to extend the exemption law so as to cover all the debtor's entire property. Yet

the courts have held such extension of exemptions, and all similar laws, unconstitutional as to existing debts.

Dawes vs. Quakenbush, 1 Denio, 128.

3 Denio, 594.

1 Comstock, 129.

Bronson vs. Kinzie, 1 Howard, 311.

And although the very learned Chief Justice of Wisconsin, in his able opinion, speaking for the Supreme Court, reprimands the counsel engaged, for denouncing Chapter 273 as an act of confiscation unworthy of that great state, we still adhere to the opinion then expressed, --that it is, in all essential particulars, an act partially confiscating the property of the railroads of that State for the benefit of a certain portion of the community, and if sustained by the courts, opens wide the door through which the total confiscation will be consummated whenever it shall please the parties interested to effect it. It is the beginning of the operations of the commune in the legislation of this country, and if not checked at the threshold, will ultimately overthrow not only all rights of property, but personal liberty and independence as well. Our last appeal is to this honorable court.

V.

This chapter, 273 of the laws of 1874, is void, because it in violation of that principle of constitutional law, which prohibits unequal and partial legislation upon general subjects.

The law arbitrarily names certain corporations which it says shall charge one price, certain other corporations

named shall charge another price, and others shall charge a difierent price for performing the same services and doing the same acts. This is an arbitrary proceeding, and is partial legislation. Some of the companies are allowed to charge twenty-five per cent. more than others, for no apparent reason. The pretended classification of the Companies by the law into A, B and C, is no classification. It is based upon no reason or principle, but simply changes the names of certain companies, and says they are A, and certain others B, and still others C. It is the same as though no classification was attempted, and the discrimination is arbitrary and partial, and for that reason the law is invalid. If it were possible to classify the roads and then prescribe different rates for the different roads, still the classification must be made on some principle or recognized basis. *Non constat*, but that the roads allowed to charge the highest price are receiving the greatest income per mile, or have been specially favored by the State.

"This law has not even the merit of uniformity. It imposes burdens upon one class of corporations not placed upon another of the same class. It grants to one privileges denied to another of the same class. It enacts that the Wisconsin Central Railway Company may so use and enjoy its property as to derive an income, while this right is denied the Chicago, Milwaukee & St. Paul Railway Company. It is class legislation in all its nakedness and deformity, without even a shadow or color of equity.

"A statute would not be constitutional which should

proscribe a class or party for opinion's sake, or which should select particular individuals from a class or locality, and subject them to peculiar rules, or impose upon them special obligations or burdens, from which others in the same locality or class are exempt.

Cooley's Constitutional Limitations, page 390.

"Mr. Locke has said of those who make the laws, they are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at the plough,' and this may be justly said to have become a maxim in the law, by which may be tested the authority and binding force of legislative enactments."

Civil Government, Sec. 142.

State vs. Duffy, 7 Nev., 349.

But if the Legislature shall undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to build such houses as others were sllowed, *or in any other way to make such use of their property as was permissible to others*, it can scarcely be doubted that the act would transcend the due bounds of legislative power, even if it did not come in conflict with express constitutional provisions. The man or the class forbidden the acquisition or the enjoyment of property in the manner permitted to the community at large, would be deprived of *liberty* in particulars of primary importance to his or their pursuit of happiness."

In Wally's Heirs vs. Kennedy, 2 Yerg., 554, it is said, "the rights of every individual must stand or fall by the same rule or law that governs every other member of the body politic, or land, under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were it otherwise, odious individuals and corporations would be governed by one law, the mass of the community and those who made the law by another, whereas the like general law affecting the whole community equally could not have passed."

Also Durham vs. Lewiston, 4 Greenl, 140.

Holden vs. James, 11 Mass., 396.

Piquet, Appellant, 5 Pick., 64.

Budd vs. State, 3 Humph., 483.

See also on this subject Cooley on Constitutional Limitations, 389 to 394.

But this matter has been fully considered by the Supreme Court of this State, and the late Chief Justice in an able and exhaustive opinion, in which all the athorities are collected, has applied and enforced the principle with his usual ability and learning.

Drake vs. the City of Janesville, 28 Wis. 464.

Bull vs. Conroe, 13 Wis. 238-244.

This act is also in violation of the 7th subdivision of the Amendment of the Constitution of this State, adopted

in 1871, which prohibits special legislation, "for granting corporate powers or privileges except to cities." This act is special legislation. Corporate powers and privileges cannot be granted by special act. This act Is special in its character, and in violation of that amendment. One Company is authorized to charge three cents, another three and a half, and another four. This is special legislation and is prohibited by the amendment. In this particular it is not general law.

VI.

The Act of March 12, 1874 *which was passed subsequent to Chapter* 273, *which assumes to fix rates, is repugnent to said Chapter so far as it prescribes rates and repeals it.*

Chapter 273 was passed and approved March 11th, 1874.

It assumes to fix arbitrary rates to be charged for the transportation of freight and passengers and made it a criminal offence to charge more than the rates so fixed, punishable by fine.

On the next day, March 12th, 1874, an act was passed entitled "an act in relation to railroads," which purports to be a revision of the whole subject matter in regard to railroads and their charges, and prescribes a new and different set of penalties for violation thereof.

The Act of March 11th, Chapter 273, fixes the rates to be charged, and imposes a penalty of not exceeding two hundred dollars for a violation of the rates there specified.

The Act of March 12th, 1874, provides, that railroads are highways, and the companies common carriers, and shall transport all passengers and freight without unreasonable delay; prohibits favoritism and unreasonable discrimination; consolidation leasing parallel lines; prohibits free passes to state officers and others; provides that any officer, agent or employee of the Company who shall violate any of the provisions of the Act shall be guilty of a misdemeanor and punished by fine or imprisonment, or both—the fine to be not less than five hundred dollars or more than five thousand dollars, and the imprisonment not less than thirty days or more than one year. It provides for punishing state officers for accepting a pass. Then follows sections 9 and 10 in these words:

"SEC. 9. If any railroad company or corporation, organized or doing business within this state, shall charge, collect, demand or recover more than a fair and reasonable rate of compensation upon any line of road within this state, which it has the right, license or permission to use, operate or control the same, shall be deemed guilty of extortion, and, upon conviction thereof, shall be fined in any sum not less than five hundred ($500) or more than two thousand dollars ($2,000) for each offense, with costs of suit, and reasonable attorney's fees, to be fixed by the court, provided, that in all cases under this act either party shall have the right to trial by jury.

"SEC. 10. All acts or parts of acts contravening or conflicting with the provisions of this act are hereby repealed."

We insist that the provisions of said Section 9, authorize the companies to charge and receive a reasonable rate of compensation for transporting of freight and passengers, that it abolishes so much of the Potter Law as fixes arbitrary rates for such transportation, and operates a repeal thereof; that extortion is the taking of more than a fair and reasonable compensation, and that taking more than is allowed by the act of March 11th would not be an extortion or a crime unless the amount taken exceeded a fair and reasonable compensation, and that the penalties are those prescribed in the act of March 12th, instead of those named in the act of March 11th; that the provisions of the last act, that no more than a fair and reasonable compensation should be charged or received, was a revision of the former law, and inconsistent with it, and that Chapter 273 was repealed by implication, and, in addition to that the repealing clause expressly repeals the former act, inasmuch as the first contravened and conflicted with the last.

It is impossible that both Acts can stand together. The first makes it a crime to charge or receive more than the amount prescribed in the first Act. The latter makes it a crime only in case you receive more than a fair and reasonable compensation, and the latter affixes different penalties from the former. The prohibition *to receive more thar a fair and reasonable compensation* is a tacit permission to charge and receive what is reasonable, and

the maxim of *expressio unius exclusio alterius*, applies and authorizes all companies to charge and receive a fair and reasonable compensation without regard to the terms of the law, approved on the 11th of March. There is no saving clause in the last act, making the schedule of rates contained in the first *prima facie* evidence, even of fair and reasonable rates. Hence, in all prosecutions and actions, the fact must be shown affirmatively that the rates charged are more than fair and reasonable compensation, or the prosecution fail.

Burlander vs. Mil. & St. Paul Railway Company, 26 Wis. 76.

We therefore insist that Chapter 273 of the laws of 1874 is unconstitutional and void.

1st. For the several reasons above stated, and

2d. That it is repealed by the act of March 12th, 1874.

JOHN W. CARY,
Of Counsel.

Supreme Court

OF THE UNITED STATES.

WILLIAM FREDERIK PIEK, HENRY R. PIERSON, MOSES TAYLOR, THE FARMERS' LOAN AND TRUST COMPANY, and THE UNION TRUST COMPANY, *Appellants.*

vs.

THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY, GEORGE H. PAUL, JOSEPH H. OSBORN, JOHN W. HOYT, and A. SCOTT SLOAN, *Respondents.*

No. 459.

SUPREME COURT OF THE UNITED STATES.

DE WITT C. LAWRENCE and Others, *Appellants.*

vs.

GEORGE H. PAUL and Others, *Appellees.*

No. 482.

Statement and Points for Appellants.

E. W. STOUGHTON, *of Counsel.*

New York:
GEORGE F. NESBITT & CO., PRINTERS,
CORNER OF PEARL AND PINE STREETS.
1875.

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SUPREME COURT OF THE UNITED STATES.

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No. 482.

These causes are presented to the Court on appeal from decrees of the Circuit Court of the United States for the Western District of Wisconsin, dismissing the bills upon

demurrer filed thereto, July 8th, 1874. The bill, in the case first entitled, was filed by Piek, an alien, by Taylor and Pierson, citizens of the State of New York, and by the Farmers' Loan and Trust Company and the Union Trust Company, Corporations of said State, against the appellees, citizens of the State of Wisconsin, to restrain the acceptance by the Northwestern Railway Company, and the enforcement by the appellees, of the provisions of an Act of the Legislature of Wisconsin, approved March 11th, 1874, and printed on pages 17 to 21 of Record, 459, upon the ground that said Act is in violation of the Constitution of that State and of the United States, and is, therefore, for these and other causes void.

The bill, in the case secondly above entitled, was filed by complainants therein, stockholders of said Company, a portion of the stock owned by Waite Talcott being that delivered to him on his surrender of stock by him owned in the Galena and Chicago Union Railroad Company at the time of its consolidation with the Chicago and Northwestern, as stated in their bill. (Record, 482, pages 3–15.) With this exception, the two bills are substantially the same; and the cases will, with the permission of the Court, be argued as one cause, the Record in the case first entitled being that hereinafter referred to.

The appellants, Piek, Pierson and Taylor, are owners of certain bonds issued by said Railway Company, secured by several mortgages executed by it upon their property and franchises severally to the Farmers' Loan and Trust Company and to the Union Trust Company, by which there was conveyed unto them, as trustees, for the benefit of such bondholders, the property, tolls, income and corporate franchises, of said Railway Company, at the times and for the purposes in said Record stated, from pages 7 to 14. Copies of these mortgages will be found commencing respectively at pages 51, 61 and 85, of the Record.

It is insisted, by the appellants, that the Act of Wisconsin, of March 11th, 1874, was repealed by that of March 12th,

1874, printed at pages 75, 6 and 7 of the Record, and that if not thus repealed, it is void, as conflicting with that provision of the Constitution of that State which declares, "that the property of no person shall be taken for public "use without just compensation;" and also with the several provisions of the Constitution of the United States, declaring that no State shall pass any law impairing the obligation of contracts, and that no person shall be deprived of property without due process of Law.

A clear presentation of these constitutional questions, and of others incidental to, and connected with them, which will be hereafter stated, requires that the organization of the Chicago & North-Western Railway Company and the corporate franchises conferred upon it by the joint Acts of the Legislatures of the States of Illinois and Wisconsin should be carefully stated; and this Court will then perceive that the enforcement of the Act complained of would not only violate the rights of the bondholders and also of the stockholders generally, for the reasons suggested, but especially those of the Illinois stockholders who have surrendered their stock in two railway corporations of that State, and on the faith of the Statutes of Wisconsin and of the compact of that State with Illinois, accepted in return therefor stock in the consolidated Company, of no value whatever if the Act of March 11th, 1874, shall be enforced.

Organization of the Chicago & North-Western Railway Company, its franchises, and the rights of its stockholders.

On the 3d of June, 1856, by Act of Congress, entitled "An Act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State," printed in Statutes at Large, Vol. 11, page 20, there was granted to that State certain sections of land for the purpose of aiding in the construction of railroads therein mentioned; and by the third section of the Act it was expressly declared that such land should be subject to the disposal of the Legisla-

ture of said State *for that purpose, and no other; and that such railroads should be and remain public highways for the use of the Government of the United States, free from toll or other charge upon the transportation of property or troops of the United States.*

The trust and duty thus devolved upon the State of Wisconsin it accepted, and undertook faithfully to execute by an Act approved October 11th, 1856, entitled "An Act to Execute the Trust created by the Act of Congress, entitled 'An Act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State,' approved June 3d, 1856, by incorporating the Wisconsin and Superior Railroad Company, and granting a portion of said lands thereto." (See Record, p. 28).

The attention of the Court is especially called to the provisions of this Act, not only because the corporation created under it is the foundation of—consolidated into and forms part of the Chicago & Northwestern Railway Company—but because the Legislatures of Wisconsin and of Illinois have repeatedly declared by enactments that all the franchises, powers and privileges by said Act of incorporation conferred upon and vested in said Wisconsin and Superior Railroad Company shall be held and enjoyed by the Chicago and Northwestern Railway Company which is declared to be its successor. (Record, page 46.)

Assuming this so, let us consider briefly the provisions of the Act.

The purpose of Congress in granting lands to Wisconsin to aid in the construction of railroads therein was to develop its resources, promote its wealth and increase the comfort and happiness of its people; and in return for these benefits the only consideration exacted was that the railroads so constructed should be and remain (of course forever) public highways for the use of the Government of the United States, free from toll or other charge upon the transportation of its property or troops. To execute this trust and

duty required that the corporation receiving these lands from the State should be endowed with the capacity of perpetual succession, with power so to conduct its affairs that its railroads should forever remain public highways, in such condition and so equipped as to be fit for the use required by the Government; and as this use was to be free of charge, it was indispensable that the Company owning the roads should, from other sources, obtain the means of so operating them as to be able at all times to render the stipulated services.

The State of Wisconsin did, by its Act in execution of this trust, endow the Corporation thereby created with all needful powers and facilities. It was declared to have perpetual succession and perpetual right, power and authority to carry persons and property upon such roads as it might construct by the force of steam and otherwise. It was authorized to receive conveyances in fee simple of the lands granted by the United States at the times, and upon the conditions in said Act of Congress mentioned, and was expressly subjected to all the restrictions, impositions, duties and obligations by said Act imposed. The lands which the corporation might acquire it could hold or sell in fee simple. Its affairs were to be conducted and carried on by a Board of Directors, who should be stockholders and by stockholders be chosen; and the charter of the corporation expressly declared that it might demand and receive such sum or sums of money for the transportation of persons and property, and for the storage of property as it should from time to time deem reasonable. It was also empowered to borrow money—to issue and sell bonds, &c., payable at such times and places as it saw fit, and execute conveyances to trustees to secure the same of all its property, corporate franchises and privileges; and to authorize such trustees to enter into possession thereof, and enjoy and use or sell the same. These are some of the principal powers and franchises thus conferred, and it is perceived they were needful,

and yet ample to enable the corporation thus created, in pursuance and execution of this trust, to perform the obligations cast upon it.

By Act approved February 12, 1857 (Record, p. 72), this corporation was authorized to consolidate with the Chicago, St. Paul and Fond du Lac Railroad Company, if a majority of the stockholders of both corporations should so agree. They did thus agree, and thereupon the two corporations were consolidated into one, under the name of the latter; and were by said Act declared thereupon to have conferred upon and merged in said consolidated Company all rights, franchises, privileges, grants, conveyances, powers, immunities, property and causes of action theretofore possessed by either, and to be subject to all debts and claims existing against either; and such Act also expressly declared that the corporation, as thus consolidated, should be entitled to all the lands of the United States granted as aforesaid, and be subject to all the conditions and obligations connected with and forming the consideration of the grants thereof.

The Chicago, St. Paul and Fond du Lac Railroad Company thus consolidated had been previously formed by the consolidation of two corporations—the Rock River Valley Union Railroad Company, originally chartered by Wisconsin, under the name of the Madison and Beloit Railroad Company (Record, p. 33), which name was, in 1850, changed (Record, p. 37), and of the Illinois and Wisconsin Railroad Company, chartered by Illinois in 1851 (Record, p. 42). The power thus to consolidate, if the companies should so agree, was given by Illinois by the Act last aforesaid, and by Wisconsin in two several Acts—one passed in 1851 (Record, p. 39), the other in 1855 (p. 40).

The Chicago, St. Paul and Fond du Lac Railroad Company having borrowed money, and mortgaged its property and franchises as security therefor, an Act was passed by Wisconsin, in 1859 (Record, p. 43), authorizing purchasers,

in case of a sale under such mortgages, to form a corporation under the laws of that State, and of Illinois, and Michigan, or either, and by a vote of its stockholders to assume and secure all debts of the Chicago, St. Paul and Fond du Lac Railroad Company; and the corporation so to be formed was to possess all the privileges, powers, authorities and capacities possessed by that corporation, by virtue of any law of Wisconsin or of Illinois; and by a statute of Illinois (Record, p. 44) a like authority was given to such purchasers, and like powers and franchises conferred upon the corporation which they might form. The railroad property and franchises of the Chicago, St. Paul and Fond du Lac Railroad Company were sold at one sale and as an entire road, under the trust deeds by it executed as aforesaid, on the Second of June, 1859, at Janesville, in Wisconsin; and on the sixth of that month, the purchasers became incorporated as one company under the aforesaid two Acts of Wisconsin and Illinois, under the name of the Chicago and Northwestern Railway Company (Record, p. 6); and thereafter, in 1862 (Record, p. 46), the Legislature of Wisconsin expressly conferred upon said Company all rights, privileges, powers and authority contained in its charter, or in the charters of the Chicago, St. Paul and Fond du Lac, and Wisconsin and Superior Railroad Companies, to which the said defendant, the Chicago and Northwestern Railway Company was declared to be the successor.

On the second of June, 1864, the Galena & Chicago Railroad, chartered by Illinois in 1836, (Record, page 46,) was, in pursuance of the laws of that State and of Wisconsin, expressly authorizing it, if the stockholders should so agree, consolidated with the Chicago & Northwestern Railway Company, the stockholders of each surrendering their stock therein, and in return receiving stock in the Company so consolidated; (Record, p. 7,) and thereafter the Legislature of Wisconsin, in February, 1865, conferred upon said consolidated Company all the privileges and franchises

theretofore conferred by the laws of that or any other State upon the Chicago & Northwestern Railway Company and the Galena & Chicago Union Railroad Company, or any other company consolidated with it. (Record, p. 51.) In 1871 the Chicago & Northwestern Railway Company was by Statute of Wisconsin, (Record, p. 60) authorized to consolidate with the Baraboo Air Line Railroad Company and several other railroad companies of Wisconsin, and such consolidation was effected, and the organization of the Chicago & Northwestern Railway Company, substantially as the same now exists, was completed.

It thus appears that this Company is composed of two corporations created by the laws of Illinois, and of three and more organized by virtue of the laws of Wisconsin; and it also appears from the Statutes authorizing the consolidation of the Illinois Companies with those of Wisconsin, that the stockholders in each agreed so to consolidate upon the faith of these laws which pledged to them the Legislative promises of these States that if they would thus agree, and surrender the stock by them owned in the several companies, and take in return that of the consolidated Company, and agree that the corporation as consolidated should assume and secure to pay by mortgage upon its entire road, property and franchises, all the debts of the several Companies so consolidating, that in consideration thereof the consolidated corporation should possess and exercise all the rights, privileges and franchises which by either State had been conferred upon the Companies composing it.

The Chicago and Northwestern Railway Company, as consolidated, executed various mortgages to secure bonds by them sold, some of which are owned severally by the appellants Piek, Pierson and Taylor. These mortgages executed severally to the Farmers' Loan and Trust Company, and to the Union Trust Company, severally conveyed to such trustees, and mortgagees the property and franchises, as the Company was by its charter expressly authorized to

do; and on the faith of such security the bonds aforesaid were sold without the States of Wisconsin and Illinois, and largely to foreigners abroad. There was no notice to such purchasers, either in the charter of said Company, nor in the bonds or mortgages, of any reservation of the right to alter or repeal such charter; but so far as purchasers out of the State of Wisconsin were concerned (they not having even constructive notice of the constitution or laws of that State) they could but assume that the charter of the consolidated Company was in perpetuity, and that there could be no repeal or alteration of the same, which could in any manner affect the rights of those who should purchase the bonds issued and secured in precise comformity with its provisions.

Before proceeding to consider the very remarkable statute,—the execution of which it is the purpose of this action to restrain,—the attention of the Court will be called to a few facts averred in the Bill, and admitted by the demurrer to show how unjust and oppressive are the provisions of the Act of which we complain. It appears (Record, p. 15) that the railroads owned by the Northwestern Railway Company in Wisconsin cost $28,074,317.35, and that their earnings for the year ending December 31st, 1873, was $3,190,523.64, and that the operating expenses were $2,099,850.66; leaving as net earnings the sum of $1,091,672. This would pay less than four per cent. per annum on the actual cost of the roads, which have done so much to develop and increase the wealth, and add to the prosperity of the State of Wisconsin. It appears also that the debt of said Company, applicable to the cost of its roads in that State is $17,247,770, and, therefore, that the entire net earnings of the roads thereon would pay less than seven per cent. upon this debt, whilst the legal rate of interest in Wisconsin is ten per cent. It also appears that the Company, between May, 1867 and May, 1873, had reduced rates of passenger fare twenty per cent., and of freight thirty per

cent., and that in consquence of the very inadequate rates received, it had been unable to pay any dividend to its common stockholders since December, 1872, and since that date but three and a half per cent. on its preferred stock. (Record, p. 15.)

The bill also avers that rates for fare and freight were fixed after as careful an examination of the facts and circumstances bearing upon the question as it was in the power of the officers of said corporation to bestow, and that such rates are reasonable and just; and it furthermore alleges that the sole security for the payments of said bonds holden by the appellants, is the said road, its equipments, appurtenances and revenue. (Record, p. 21.)

On the 11th of March, 1874, the Legislature of Wisconsin passed the Act complained of, (Record, p. 16,) which by its terms reduced the rates for the carriage of freight and passengers more than twenty-five per cent. below those then fixed and charged as aforesaid, by the Chicago and Northwestern Railway Company; and the Bill avers, and the demurrer admits, that the effect of such reduction if submitted to will be, that instead of returning any compensation whatever to the owners of said roads, the same will be run at a loss, and consequently the value of said roads will be entirely destroyed, and the security which is held for the payment of the bonds owned by said appellants, rendered worthless. (Record, p. 21.)

A brief synopsis of this unprecedented and unjust statute is here deemed appropriate. Its framers, while destroying the value of the stock and bonds issued by this Company, also designed to give to the citizens of Wisconsin a certain advantage over all others in the transportation of the products of that State. By Section 3 of the Act freights are divided into four general classes, Nos. 1, 2, 3, 4, and into seven special classes, to be designated as D, E, F, G, H, I, J.

D comprises Grain in car loads.

E—Flour, 50 barrels or more; Lime, 24 or more.

G—Lumber, Lath and Shingles, in car loads.

H—Live Stock in car loads.

These are productions of Wisconsin, sold in great quantities out of that State, and hence its citizens desire to transport them throughout its borders, at the lowest rates possible. By Section 4 the rates of freight are fixed for the carriage of the articles in quantities specified in classes D, E, G and H, and also in the three other special classes, F, I, J. By Section 5 of the Act the roads classed as A and B were not to charge higher rates of freight for carrying freight classed under the four general classes mentioned in the third section, than was received by said companies on the first of June, 1873; but these rates were much higher than those prescribed for the carriage of the freight classed as D, E, H and G, and the three Railroad Commissioners to be appointed under the Act were empowered by Section 13 to so classify all articles transported on any railroad, except articles mentioned in D, E, H and G, as to place them in either of the said four general classes, or in the special classes except D, E, H and G, thus expressly declaring that the Commissioners should in no manner interfere with either of those four classes by removing from them either of the articles comprised therein, and placing them in classes where a higher rate of freight might be chargeable thereupon. And whilst these Commissioners were empowered to reduce rates of freight on articles comprised in either the general or special classes, they had no authority to increase the same, except as such increase might result from a change in the classification as aforesaid—by removing articles comprised in F, I and J to one or more of the four general classes numbered First, Second, Third and Fourth—thus it will be perceived, carefully excluding from this possible increase articles constituting the staple products of Wisconsin. In the nature of things, and upon solid principle, there was no reason for this discrimination. It must be found in the de-

sire of the representatives of the people of Wisconsin to secure for them a benefit, by an arbitrary and unjust exercise of supposed legislative power.

Without entering fully into the details of this Act, it is enough to present here its general features, and these are certainly extraordinary. The railroads of the State are divided into three classes, A, B and C, instead of being designated by their corporate names; and as the roads descend in the alphabet, they rise in the scale of the rates they are severally authorized to charge for the carriage of freight and passengers—these rates being arbitrarily fixed by the Legislature, without investigation, and with no opportunity given to the several Companies to be heard on a subject so vital to their interests, and even existence. Three Commissioners were to be appointed, to be in no manner interested in railways, with authority to examine witnesses, &c., and, among other things, to ascertain the cost of each railroad within the State, the gross receipts and total net earnings thereof, and various other facts, as one would naturally suppose, for the purpose of increasing rates of freight and fare, if those fixed by the Act were too low. This, however, was not confided to their discretion; for they were only authorized further to reduce the rates prescribed, if, in their judgment, or in the judgment of a majority of them, it can be done without injury to said railroads; and the bill avers that they will proceed to re-classify and reduce rates, unless restrained by injunction. The Act also declares that the said railroads shall be bound by the decision of said Commissioners, or a majority of them, with reference to said rates, and that every violation thereof shall be a misdemeanor, subjecting the offending Company or individual to fine, and to an action by the party aggrieved. Penalties are inflicted for any refusal to transport freight at the rates prescribed by the Act, or by the Commissioners, or for charging more than such rates; and whilst the companies are thus required to perform these

services, and to continue to operate their roads for that purpose, they are commanded, under heavy penalties, to do so for a compensation, confessed by the demurrer to be so inadequate as not to pay running expenses. And the bill also avers that even these rates it is the purpose of the Railroad Commissioners to reduce, and that they and the Attorney-General, who are appellees, are preparing to enforce the provisions of said Act by prosecutions for penalties, and otherwise, to the injury and destruction of the rights and interests of the appellants.

On this state of facts the appellants will insist that the Court below had jurisdiction to grant the relief asked for; that the Act in question was repealed by that of March 12th, 1874; that such portions of the Act complained of as prescribe rates of fare or freight for the carriage within Wisconsin of persons or property coming from or going to other States, is in conflict with the provision of the Constitution of the United States empowering Congress to regulate commerce between the States, and to that extent is void; that the Legislature had no authority to alter said Charter; that the Act in question does not alter or purport to alter the Charter of said Company, but is in substance a confiscation of its property, a taking of it for public use without compensation and without due process of law; that the power to determine what is a reasonable compensation for the services of common carriers, is a judicial, not a legislative power, which the Courts alone can exercise; that if this were otherwise, there is a limit to the authority of the Legislature to alter charters by virtue of the power to that effect reserved therein, or in the Constitution of Wisconsin, and that this limit is to be prescribed, not by the will of the Legislature, but by that of the law as administered by Courts of Justice; that the Legislature has no authority to impair the obligation of contracts entered into, as aforesaid, between the several stockholders of the Illinois and Wisconsin railroad companies in precise conformity with the Statutes of those

States; that such Statutes operated as a compact between those States, which neither could alter without the assent of the other; and that the Legislature of the State of Wisconsin could not lawfully impair the contracts made between the bondholders and their trustees, and the said Company, as attempted by the Act of March 12th, 1874; for all and each of which causes above stated, the appellants will insist that the said Act is unconstitutional and void.

Before proceeding to argue these several propositions, a few general observations are deemed appropriate. If the Act be valid, the Legislature of Wisconsin, or such of its officers or agents as it sees fit to designate, may arbitrarily fix the compensation to be received by the railway companies for their services and risk as common carriers, without appeal, without reference to the cost of operating their roads—permitting some companies to charge more than others for similar services; and acceptance of these rates may be enforced by the State by penalties and criminal prosecutions. If one conveys the profits of land, the land passes, for what, says Lord Coke, in language adopted by this Court as expressing the law, is land, but the profits thereof? If these rates are binding upon the corporation, it is because the Legislature and its agents have absolute power to fix them independent of, and against the will of stockholders and directors. If this power to determine what compensation common carriers may receive can be thus arbitrarily assumed and exercised by the State having no interest whatever in the property, may it not with equal propriety fix the sums the corporation shall pay for the hire of men and purchase of materials necessary for the conduct of its business? The exercise of one of these powers necessarily involves the right to employ the other, for what propriety or justice is there in fixing the carrier's compensation, without regard to the cost or risk of conducting his business, and if the right here claimed may be exercised, does it not follow that the price of the products of the manufacturer

may be thus fixed without regard to its cost? By the terms of this Act the corporation is in substance prohibited, under heavy penalties, from making contracts for the price of the carriage of freight or passengers, or for the performance of any service or risk as a common carrier. This authority the State claims the exclusive right to exercise, although, as was said in 4th Hill's Reports, page 143, the power of making bargains for individuals has never been delegated to any branch of the Government. Whilst this authority is thus claimed, and the corporation is expressly forbidden to bargain for, ask or receive any greater compensation than that prescribed, it must of course be conceded that the persons for whom services are rendered by the Company, are not bound by the rates fixed, for as against them these must be reasonable, and that question they may at any time submit to the determination of a Court and jury; and of this right they cannot be deprived. If the Legislature may lawfully exercise this power, it is obvious it can at pleasure render the entire property of the Company worthless; for it is quite immaterial with what prudence, skill and economy its affairs are conducted, if its receipts may be regulated by the arbitrary will of the Legislature or its agents. If this may be lawfully done it needs no argument to show that the property of every corporation held subject to this extraordinary power, may in substance be taken from it, and its benefits transferred to the public who travel and send freight over its roads. The case is not altered by saying that the title to its road-bed, cars and equipments still remain in the Company; for the only purpose of investing in these is to obtain a fair profit from their use in connection with the services of the officers and agents to be employed by the corporation. When, therefore, its income is taken, or so controlled by the State that none or less than a just compensation is derivable from its property, the latter is in the most substantial sense taken without due process of law, and without compensation.

The utmost subtlety cannot wriggle out of this conclusion. To say that the right to take a reasonable compensation for the services of a commmon carrier is a franchise, proceeding from the State, which it may at pleasure recall, is simply to assert that when it creates a corporation for the construction and operation of railways or for the manufacture of cloths, it invites the investment of capital, subject to the right of the Legislature immediately utterly to destroy its value to the owner by prescribing what may be received for services or products. Is the right to obtain this just compensation a franchise derived from the State, or a part, and the only valuable portion of the capital invested? By what process is this extraordinary transformation effected, whereby the State may at will so dispose of the property of the stockholders, that whilst they may continue to hold its barren title, the State may control its use, and distribute its income and profits to strangers? To say that this is but altering the franchise, which the State conferred, is but christening a wicked fraud under another name. The property of the stockholder is, nevertheless, taken from him, without due process of law; and without compensation; and to call this the withdrawal of a franchise, which the State gave, and may at pleasure take away, is but a wretched falsehood poorly clad. This, however, seems to have imposed upon the Supreme Court of Wisconsin, if we may judge from a late opinion of its Chief Justice, in which it is declared that the Act does not at all meddle with the material property distinct from the franchise, but acts only on the franchise, and not at all on the material property. Does that Court really believe the income of a railway company is not material property, and that only its road-bed and cars when incapable of yielding a profit are? What would the Judge who delivered the opinion on that subject judicially say if a like proposition were urged on behalf of men who by fraudulent management as directors should deprive the stockholders of all income from their investments? He

certainly would not call this, or the right to receive it, a franchise and say the directors had not meddled with the material property. He would probably tell the fraud-doers in very plain language that the right of stockholders to a fair return for their investment was as sacred as that of any other owner of private property to its proceeds, and that such investment was of no material value whatever, except as a source of income.

In the same opinion, the Justice who delivered it said, the Statute in question had been denounced as an act of communism, but that he thanked God, Communism was a foreign abomination without recognition in Wisconsin, where the people were too intelligent, too staid, too just, too busy, too prosperous for any such horror of doctrine. It is quite true that the theory of the Statute is distinct from the doctrine of the Communists. The latter divides property ratably between the plundered and the plunderers, while the former takes all for the Grangers.

It is clear, therefore, that the State has assumed to exercise such absolute control over the property of the Corporation, by whatever name it may be called, as renders it quite valueless at the pleasure of the Legislature; and it is equally clear that, unless corporate property is wholly unprotected by those invincible common law and constitutional provisions which protect all other private property, the Act in question is utterly void. It has sometimes been said that railways are public highways which, in substance, belong to the State, and may, therefore, be dealt with as public property. At others, that inasmuch as the State exercised the right of eminent domain to enable Railway Corporations to secure the needful land for their roadways, this rightly subjected them and their property to State control. These are but feeble pretexts on which to build the right to take millions of property forcibly and without compensation. In so far as railways are subject to public use, they are public highways open to all persons who see

fit to travel in, or send freight by, the cars of the corporations owning them, at reasonable rates of compensation; but it is well settled that these are private corporations, and their property private property. The State has never paid a dollar towards the construction or equipment of our railway, and by its Constitution is expressly prohibited from so doing, or from operating public works except as hereinafter stated. How, then, or by what title does the State own the railway constructed by the Chicago and Northwestern Railway Company? Is it because it has seen fit to declare it a public highway? And how much is gained by invoking the aid of the right of eminent domain exercised to enable the Company to obtain a small portion of its land, which it acquired only upon paying to the owners full compensation therefor? The State lost nothing by this, nor did those whose lands were thus taken. These pretences of franchise altered, of public highway, of eminent domain, are but flimsy muniments of title to the millions which the State seeks to grasp and hold by force of the Act in question. Those who attempt to accomplish and to justify this appropriation of the property of Corporations can find no precedent for the outrage in the legislation of any State or country. A reference to 1st Shelford, on the Law of Railways, containing the Act of Parliament of 1844, will illustrate with what justice the Legislature of Great Britain, having imperial power, deals with this kind of property. There, in a general Act, provision is made for regulating the rates of fare chargeable by Railway Companies *thereafter* to be created in that country, and these are subject to such revision, that when the Companies are able to pay ten per cent. dividends upon the cost of the roads, the rates may be reduced, *provided the Government shall guarantee a continuance of profits equal to that sum;* and a somewhat similar provision, without the guarantee, will be found in the 18th Section of the Act of Congress incorporating the Union Pacific and other connecting railways. It has been reserved

to the Western States, where the money lender is permitted by law to exact for loans a high rate of interest—in Wisconsin, ten per cent.—and where the manufacturer and the farmer may charge at pleasure for their products, to attempt arbitrarily, without legislative or other inquiry, and without notice to the corporations to be affected, to seize upon the management of their railways, fix the rates beyond which they shall not charge for services, at a time when those are so low that no dividends can be paid upon their common stock, and but three and a half per cent. upon the preferred, and thus to utterly prostrate the credit of these companies at home and abroad, reducing the value of their bonds held by foreign and other capitalists to the extent of many millions of dollars, and causing these obligations to the amount of hundreds of millions to be dishonored for non-payment of interest. It is not surprising that in view of the national disgrace thus inflicted upon our country by this State legislation, our Consul at Rotterdam, in an official communication addressed to the State Department at Washington, should have said: "Concerning the transactions in United States railroad shares which, before the catastrophe in the United States, had been so important an element in the Dutch money market, I have but to repeat the statement of my preceding annual report. Far from showing any sign of returning confidence in United States railroad shares, the Dutch public rather manifests increasing aversion. The sale of United States railroad securities, even at the lowest rates, is limited to the smallest minimum. The laws recently enacted in Wisconsin concerning railroads have just affected those securities, in which the Dutch capitalists had invested enormous sums, namely the Chicago & Northwestern, and the Milwaukee & St. Paul Railroads. As yet the holders of these bonds still believe that the hopes created and entertained by the directors of these railroads will be realized, and that those laws will be annulled by the Supreme Court. Should this not

be the case, a new depreciation of these securities, as well as of all other American railroad bonds, may be expected. For years to come, no investment of Dutch capital in United States railroad enterprises will be made. Financiers who, in this country, have been dealing in United States railroad securities, agree in declaring that a revival of confidence in American railroad enterprises can only be expected when a radical change of the present legislation on railroad companies takes place in the different States."

To what action of foreign governments for the protection of their citizens, who have invested millions in these securities, this legislation, if enforced, may lead, cannot be foretold; but it is quite certain that, if by a similar national act of confiscation, our government should thus seize the property of foreign capitalists on either of the pretexts here put forth on behalf of Wisconsin, they would be condemned as frivolous excuses for national robbery by the judgment and moral sense of the civilized world; and would afford but a poor shield against the international weapon of reprisal which may rightfully follow the refusal of our nation to satisfy the just claims of citizens of another, who have been refused protection of liberty or property by our laws. A State of our Union may plead that, as it can hold no intercourse with a foreign government, it cannot be subjected to the consequences of this doctrine; but this immunity will hardly justify a disregard of duties which every political community is bound to perform towards those who place themselves or their property within its jurisdiction. Nor is it wise, or respectable for any State of our Union to bring discredit upon itself and sisters by outraging the rights of foreigners, merely because it cannot be punished for so doing? A decent pride, if not a native honesty, should rather induce it to seek the respect of foreign nations, even if denied the privileges of international recognition and association. It should be borne in mind, however, that it will be difficult to make foreign nations comprehend, how it is,

that a great people like ours, should have so organized their internal civil administration that each and all of our great State divisions should be controlled by Legislatures posessing unlimited power to plunder foreign citizens without responsibility to their governments, or to any department of our own; and whilst, if this be so, it cannot fail to degrade us in the esteem of all honest men, it would afford but a poor excuse against a claim upon our general Government for restitution, should the Western Legislation already existing be enforced to the substantial confiscation of hundreds of millions of railway bonds, whose foreign owners now anxiously await the decision of this Court. Should this hope fail them, but one resource remains; for after what has occurred it would be but mockery to ask them to rely upon the justice of States, which, although enriched by contributions of foreign capital, are nevertheless capable of seizing and appropriating it, upon the pretences here put forth. In using the words seizure, appropriation and confiscation of this property, to indicate the acts authorized, I employ no exaggerated phrases, for if the provisions in question shall be enforced, they result in nothing less. A statute which should prohibit a person, under heavy penalties, from renting his property beyond certain rates—barely sufficient to pay cost of management and taxes—which should authorize certain persons to reduce even these at pleasure—would as effectually sieze, appropriate and confiscate it, as if the entire title were taken away. Indeed the Acts here authorized are the worst possible form of confiscation, for whilst the power asserted is, to declare what may be received as income—which is the sole purpose of investment—it is made the duty of the corporation to employ the money of its stockholders in operating, at vast expense and risk, these roads; and no matter with what economy, skill and labor this may be done, there still stand ready the Legislature, or its appointed agents, to reduce the prescribed rates, if by this successful

management they shall accumulate beyond running expenses and taxes. No legislative outrage can exceed this; and whilst one Wisconsin company—the West Wisconsin Railway Company—has already been crushed by it, those here represented must, as admitted upon this record, share a similar fate, if not saved therefrom by the decision of this Court.

Respectfully submitting this preliminary statement, I now proceed to argue the questions here involved—as grave, and in their consequences as important, as any ever presented for judicial consideration.

I.—The Court below had jurisdiction of the parties; and if, as averred in the Bill, the defendants were about to enforce execution of an unconstitutional Act of the Legislature of Wisconsin, to the injury of the complainants' rights of property, it was the duty of the Court to restrain this by injunction.

1. Where jurisdiction depends upon the parties, the Court looks only to those named in the record, and though a State may be solely interested in the enforcement by its agents of an unconstitutional law, those charged with its enforcement are the proper parties defendants, and may be restrained.

   Osborne *vs* Bank of the U S., 9 Wheaton, 338.
   Davis *vs* Gray, 16 Wallace, 203.

2. The facts stated in the Bill clearly show, that if the Act in question shall be executed, the property of the complainants will be sacrificed and the contracts under which the same is held impaired; and if these are protected by the provisions of the Constitution of the United States and of the State of Wisconsin, as we insist they are, the relief prayed for should be granted.

II.—The statute in question was repealed by the Act of March 12th, 1874.

1. The provisions of the two are utterly inconsistent with each other, and both cannot stand.

2. Although by joint resolution of March 12th, 1874, the Secretary of State was directed not to publish said Act until April 28th of that year, this resolution has not the force of a law of the State, and could not detract from the rigor, as such, of the Act, the publication of which was postponed.

It might not be operative for the purpose of enforcement until the 28th of April, but existed as a law from the time of its passage on the 11th of March; and the Act of March 12th being passed expressive of the legislative will, that the law of the previous day should be repealed, the effect of that could not be averted by the passage of a joint resolution.

III.—That portion of the Act of Wisconsin, passed March 11, 1874, which prescribes what rates may be charged and collected by the Chicago and Northwestern Railway Company, for the transportation of freight upon and over its roads within that State, is, in the respects hereinafter mentioned, unconstitutional and void, upon the ground that it is a regulation of inter-State commerce, of which the Congress of the United States has exclusive jurisdiction, by force of that provision of the Constitution empowering it to regulate commerce among the several States.

1st. Wherever the subjects over which power to regulate commerce is asserted, are in their nature national, they may justly be said to be such as to require

the exclusive legislation of Congress; and the transportation of passengers or merchandise through a State or from one State to another, is of this nature.

(Case of the State Freight Tax (15 Wallace, 279–80.)

And it is of national importance that over such subjects there should be but one regulating power.

2d. The third section of the Act in question declares that all freights thereafter transported upon any railroad or part of a railroad in said State, shall be divided into four general and seven special classes, which classification, when carefully examined, will show that the purpose of the framers of the Act was to secure advantages to those who desired to transport the principal products of that State over all others; and Section 4 declares that no individual company or corporation, owning, operating, managing or leasing any railroad or part of a railroad, shall charge for or receive a greater or higher rate for carrying the articles in said section enumerated than is therein specified. No discrimination is made by said section between freights to be carried for citizens of the State or for persons not citizens; nor is any made between articles to be transported wholly within the State and those taken up without the State and brought into it, or those taken up within the State to be carried out of it. The transportation of all freight, of all persons, whether citizens of that State or of other States, or aliens, from whatever part of our country, or of the world it may have been brought, or whithersoever it may be going, come alike under the regulation attempted to be imposed upon the carriage of merchandise by the provisions of this Act. The only exception made is contained in the 18th Section, framed undoubtedly upon the theory that the provisions of the Act, unless somewhat re-

strained, would be unconstitutional; and this only exempts from the operations of the Statute, freight coming from beyond the boundaries of the State, and to be carried entirely across or through it. The person who drew this section evidently supposed that Congress had no power to regulate that commerce which consists in sending merchandise from other States *into* Wisconsin, nor that which consists in sending products *from* that State *into* a sister State; but that this power of Congress was limited to the regulation of such commerce *only* as consists in sending merchandise, for instance, from the City of New York entirely across or through the State of Wisconsin into another State. This legal conception of the meaning and operation of a great Constitutional provision, designed to preserve uniform and uninterrupted commercial intercourse between all the States of the Union, reduced to plain English, may be stated as follows:

(1.) The State of Wisconsin may impose any restriction it pleases upon the transportation of merchandise from any point within that State to another State; and hence the State of New York or any other may restrict at will the conveyance of merchandise from it to the State of Wisconsin or to any other.

(2.) So, too, the State of Wisconsin, whilst it cannot impose regulation or restriction upon the conveyance of merchandise from any other State, entirely *through* and *across* its territory, may, if such merchandise has been sent, for instance, from the City of New York to a point within Wisconsin, cripple its progress from the moment it touches that State, until it reaches its destination therein, by any restriction it may see fit to impose; and so, by a like interpretation, may the progress of merchan-

dise which Wisconsin allows to pass unrestricted from another State through its territory towards its destination in a State next beyond, be crippled in the same manner by the legislation of the latter State.

(3.) The practical result of this remarkable interpretation of the Constitution would be, that as to merchandise sent from one State of the Union to an adjoining State, the Legislatures of both may unite in crippling its progress by any legislative restrictions they see fit to impose; whilst if the same merchandise be sent entirely across such adjoining State, the crippling ability of its Legislature is suspended only to bring into full play the energies for that purpose of the State beyond, within whose borders the merchandise is to be finally deposited; if indeed the legislation of the State from which it started, shall not have so paralyzed its movement as to compel a halt before reaching the adjoining State, whose powers for mischief being temporarily suspended, permits it to pass on without interruption.

(4.) If it shall be urged, in opposition to the opinion of the contriver of this 18th Section, that the provisions of the Act prescribing what rates may be charged for the carriage of freight, do not in substance regulate commerce between the States, because they purpose to reduce and not to increase charges and burdens upon the transportation of merchandise from one State to another, and therefore do not restrict but rather encourage such commerce, the answer is

(*a.*) As the State is powerless to regulate commerce because of the exclusive right of Con-

gress so to do, and as the purpose of all regulation is to encourage, not repress it, any regulation of it whatever, whether for good or evil, is a usurpation of power by the State. Of the manner of its regulation, Congress is the exclusive judge, and that body might possibly suppose that to encourage the construction of railways and other means of transportation of merchandise by permitting common carriers thereof to receive reasonable rates of compensation for their service and risk, as such, subject to their common law obligations, would be much more likely to promote commerce between the States than to permit the latter to prescribe rates so inadequate as to discourage the building of railways altogether. Congress might indeed take a broader and wiser view of the subject than is propounded by the Act in question, and arrive at the conclusion that inasmuch as the railways of Wisconsin, and of the great, growing and prosperous West, would never have been built but for the aid of capital from other States and from abroad, which would not have been afforded if the legislation in question could have been foreseen, that such portion of it as attempts to regulate commerce by seeming at first blush to reduce rates for the carriage of merchandise, really tends but to cripple and destroy it.

(*b.*) It cannot be justly said, however, that the power thus asserted by the State of Wisconsin, which pretends only to prescribe rates beyond which the Company may not charge, is not in substance the exercise of a power to

regulate the entire subject of charges for the transportation of merchandise from one State to another, by declaring what sum may or may not be demanded for the carriage of each one hundred pounds in weight. If the Legislature may define a sum beyond which the Company shall not charge for such a service, it may of course declare what it *may* charge and receive, and consequently the extent of lien to be discharged before the merchandise is permitted to enter the borders of another State. If this is not a regulation of inter-State commerce, it is difficult to find an illustration of what is.

(5) The exception contained in the 18th Section but makes the unconstitutionality of this Act the more obvious and striking by clearly presenting one of the very mischiefs which it was the purpose of the framers of the Constitution to prevent. Thus this Section professes to allow the railway companies to charge such rates as they please for all merchandise by them carried entirely across Wisconsin, for instance from Illinois to Minnesota or to Michigan, but absolutely prohibits them from charging beyond certain specified rates, for carrying the same merchandise into any part of Wisconsin from either of those States, or from any part of Wisconsin to the borders of either. The effect of this would be to encourage the companies to charge exhorbitant rates for the transportation of merchandise, from New York, for instance, or any other State, across the territory of Wisconsin, that they might be able thus to sustain themselves, under the ruinous rates of compensation imposed by the Act for the carriage of the products

of that State to the borders of an adjoining one, or such merchandise as the citizens of Wisconsin might need coming into it from another State.

Let us suppose, for illustration, these railways to be navigable rivers, and in the broad and general sense public highways, and that the State of Wisconsin should prescribe rates of compensation for the carriage of all merchandise thereupon coming from the State of Illinois to some place within Wisconsin, and of all products going from the latter State to Illinois, and should also provide that as to all merchandise transported from the latter State along those rivers through the State of Wisconsin, the carriers thereof might charge such rates as they saw fit. Would not such an act be deemed not only a regulation of commerce, but one most hostile to the State into whose territory such merchandise was to be transported after passing through that of Wisconsin?

(6) The provisions of the Act which attempt to prescribe the compensation to be charged for the transportation of passengers upon the railways of the Company within the State, are also unconstitutional and void by force of decision of the Supreme Court of the United States, in Crandall *vs.* State of Nevada, 6 Wallace, p. 35. The doctrine of that case is based upon the theory, that there can be no interruption whatever by means of State Legislation, of the free passage of persons from one State to another, and throughout each and all of the States of the Union. If the power to declare what shall *not* be charged involves, as it necessarily does, the power to say what *may* be exacted for the carriage of passengers, it follows that the State of Wisconsin may require each to pay, to

use in substance the illustration of the Court in the case cited, instead of three cents a mile, three dollars, or three thousand dollars, and thus in a great national emergency, prevent persons from leaving the State by means of railways, to go to other portions of the Union in aid of their Government. In support of the proposition that no such right to cripple commerce or travel exists in the States, the Supreme Court in the case of the State Freight Tax before cited, propounds with much force, in addition to other considerations, the utter absence of right on the part of a State, to fix rates of compensation for the carriage of freight or passengers, inasmuch as it neither owns nor has an interest in the property, the use of which it thus attempts to control; but in both of these cases that Court puts its decision upon high Constitutional and national grounds, and these, it seems, to me are as applicable to this case, as to either of those.

IV.—The provisions of the Act in question do not purport to be, and are not an alteration or amendment of the charter of the Chicago & Northwestern Railway Company; but if executed constitute a legislative confiscation of its property—a taking thereof for public use without compensation therefor, in violation of the Constitution of Wisconsin—and a taking thereof without due process of law in violation of the Constitution of the United States.

FIRST.—Let us suppose that there existed no provision in the Constitution or laws of Wisconsin authorizing the alteration or amendment of charters; and that this Act had nevertheless been passed.

Would it not be judicially defined as a law attempting to take property for public use without compensation; as one seeking to appropriate it without due process of law? Clearly such would be the effect of its provisions, and by these it would be defined and condemned. Looking at its language we vainly search for any expression showing an intent to alter the charter of any corporation; but instead is found a peremptory prohibition, under heavy penalties, against demanding or receiving greater rates than those prescribed, with the command to submit to that measure of compensation, until the Commissioners appointed prescribe less, and then, under similar penalties, to submit to that. This Act is in the usual form of penal legislation. It submits nothing for the approval or acceptance of the corporation. It is unequal and partial in its operation, and therefore should be condemned as void. It permits no participation by its directors or stockholders in fixing compensation for services and risks as common carriers, but in form and effect takes from them not only the control and management of the property in this vital respect, but actually prescribes rates of fare and freight so low—so utterly inadequate—that what has cost its owners more than $28,000,000, is rendered practically worthless; whilst the people of the State, and others who use the road, enjoy the proceeds of this Legislative plunder. If the law, instead of fixing rates of compensation and appointing agents of the State to reduce these at pleasure, had simply provided that the charter of the corporation should be so amended as to permit the appointment by the Legislature of a majority of directors not stockholders, who should sit as such,

and possess all the powers of those chosen by the stockholders, such change would have been, in form at least, an alteration of the charter—whether valid or invalid—and such legislation would have been eminently just and respectable when compared with that we are considering; for directors thus injected might have possessed ordinary intelligence and honesty, and if so, would have acted in subjection to these qualifications, and so acting would have informed themselves of the cost of operating the road, and if not unduly ambitious of political advancement in Wisconsin, would, doubtless, have fixed upon rates less ruinous than those adopted by the Statute in question.

SECOND.—In this connection it should be borne in mind that the power to alter charters contained in the Constitution of Wisconsin, was adopted in connection with the provisions therein contained, that "the property of no person shall be taken for public use without just compensation," and in subjection to that provision in the Constitution of the United States, which declares that "no person shall be deprived of property without due process of law." It cannot be supposed that the framers of the Constitution of Wisconsin intended that the right reserved to the Legislature to alter the charters of corporations could be so exercised as to violate either of the two fundamental constitutional provisions to which I have referred—adopted for the protection of property, in affirmance of the natural rights of men. Compared with these sacred guarantees, that of altering or amending charters was of trifling importance; and whenever it can be discerned that a legislative enactment, if enforced, will take property for public use without

just compensation, or deprive any person of it without due process of law, such provision is in no just sense an alteration of a charter, and is never, by any construction, to be deemed such; and whenever either of these wrongs may be perpetrated under a statute, whatever may be its form, it is the duty of courts judicially to declare it void, and they should struggle to do this whenever its enforcement will lead to the taking or depreciation of property. In other words, such a statute should be construed strictly, and brought within the condemnation denounced by the two constitutional provisions I have invoked. In the language of Mr. Justice Story, in Wilkinson *vs.* Leland, 2 Peters, 65, "The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least no court in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well-being, without very strong expressions of such an intention." "We know of no case in which a legislative act to transfer the property of A to B without his assent, has ever been held a constitutional exercise of legislative power, in any State in the Union. On the contrary, it has been constantly resisted as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced." And to the same effect is the language of the Supreme Court of the State

of New York, in Taylor *vs.* Porter, 4 Hill, 145, where it is said, "The security of life, liberty and property lies at the foundation of the social compact, and to say that this grant of 'legislative power' includes the right to attack private property, is equivalent to saying that the people have delegated to their servants the power of defeating one of the great ends for which the government was established."

It should be here added that the prohibition in the Constitution of the United States, and in most or all of the States, against taking private property for public use without just compensation, and against depriving any person of property without due process of law, is but declaratory of the law as it existed and was declared by Courts of justice, antecedent to any constitutional provision on the subject.

Pumpelly *vs.* Green Bay Co., 13 Wall., 166, and cases there cited.

And in view of this, and of the declaration of this Court in State Bank of Ohio *vs.* Koop, 16 Howard, 385, adopting the language of Chief-Justice Marshall in 6 Cranch, 135, "that the Constitution of the United States contains what may be deemed a bill of rights for the people of each State," it is clearly the duty of Courts of justice so to apply the constitutional provisions I have mentioned as to include all cases in which a State Legislature attempts to deprive a person of property without due process of law, irrespective of the form or pretext under which such deprivation is attempted.

THIRD.—Is this attempted by the statute in question? It is well settled that where the property of a cor-

poration is private—that is, contributed by private persons, the corporation itself is private; and to this there is no exception; and it is also firmly established that incorporated companies for the construction and operation of railways, by means of capital contributed by private persons, are private corporations, and their property, private property.

State Bank of Ohio *vs.* Koop, 16 Howard, 381.
Olcott *vs.* The Supervisors, 16 Wall., 678.
People *vs.* Batchellor, 53 N. Y. R., 140.

Of this property the corporation can be deprived only when it is taken for public use on payment of just compensation—and this cannot be fixed by the Legislature taking it—or when the deprivation is by due process of law. If the property of the Chicago and Northwestern Railway Company will be taken, if the Act of March 11th, 1874, shall be enforced, such taking certainly cannot be justified under the pretext of altering its charter; for we have already seen that authority to do this is reserved in subjection to the other two much more important constitutional provisions, and hence the reservation must read thus: that the Legislature shall have power to alter the charters of corporations, provided that in so doing they shall not be deprived of their property. The question, therefore, recurs: Will the Act in question, if executed, work this deprivation? for if so, it is not the alteration of a charter, the right to do which, is reserved.

It was held in Taylor *vs.* Porter, 4 Hill, 142, before cited in determining whether property had been taken without due process of law, that it was not material to inquire what *quantum* of interest had been taken. It is enough, said the Court, that some interest — some portion of his estate—no

matter how small—has been taken from the owner without his consent. In that case a right of way over land had been taken by legislative enactment, leaving the fee in possession of the owner; and this was held a violation of that provision which forbids depriving any person of property without due process of law. So it was held in the case of Pumpelly *vs.* Green Bay Co., before cited, 13 Wall, 174, that where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having artificial structures placed on it, so as to effectually destroy or impair its usefulness, it is a taking within the meaning of the Constitution. Can it be doubted that the enforcement of the Act in question, which it is admitted would deprive the Company of all income or profit from the use of its property, would also be a taking within the meaning of the constitutional prohibition? Such a consequence is utterly distinct from alteration of its charter, and until Courts are ready to disregard all solid distinctions, they will, it is respectfully submitted, determine, that whenever legislative interference with private corporations deprives them of property, to any, even the least degree, without due process of law, it is a violation of the Constitution of the United States not to be permitted, and not the alteration of a charter. It is not difficult to bear this distinction in mind, or judicially to enforce it. For what purpose did the Legislature of Wisconsin frame and pass the Act in question? The answer is quite obvious—it was to take from the Company its income, and bestow it upon the public—upon those who should use its road. If it be said, the income was not taken because never received, the answer is, such might be the case if a person should

be forbidden by the Legislature to rent his house beyond a sum sufficient to pay taxes instead of as heretofore obtaining a rent sufficient to pay these, and a fair interest on the investment. In that event the Act would not take his income literally, but it would effectually deprive him of it by giving the use of his property to another. So here the corporation is denied the privilege of demanding or receiving any income whatever from its railway, or for services as a common carrier, and is, therefore, as effectually deprived of its property without due process of law, as if its road and cars were forcibly taken.

I submit therefore, that neither in form or substance is the Act of March 11, 1874, an alteration of the Charter of the Chicago and Northwestern Railway Company.

V.—Under the reservation contained in the Constitution of Wisconsin to alter charters of incorporation, its Legislature had no authority to prescribe rates of fare and freight chargeable by the corporation for services, as a common carrier; for the right to receive a reasonable compensation for such service, whether performed by an individual or corporation, is sacred and indefeasible, reposing upon foundations more solid and ancient than any corporate privileges, and not to be disturbed, or denied, except upon express assent of the party performing them, or by force of judicial decisions. The Act we are now considering is, it is believed, the first legislative attempt ever made to fix this compensation without express authority in the charter so to do; and if it shall succeed upon the theory that it is in judgment of law an alteration of the charter of the

Chicago and Northwestern Railway Company, it must be upon the ground that the right of a Railway Corporation to receive a reasonable compensation for its services and risk as a common carrier, is purely and exclusively a franchise, derived solely from the State, and not from the ownership of its road, or the labor of its officers and servants, and therefore that such right to compensation may be withdrawn, or its measure fixed at the pleasure of the Legislature. And if this right be simply a franchise conferred by the bounty of the State, to be continued, or changed at its will, it necessarily follows that proceeding from the State it may be appropriated, or wholly taken away at will, and hence, that the State may adopt other modes of absorbing the income of the corporation than that here attempted; for, assuming the correctness of this monstrous doctrine, it would be highly unreasonable to insist that the State is limited to but a single method of despoiling the stockholders of corporate property. If it may prescribe the limit of compensation to be charged, and that limit, be as here, so low that no income can be derived from the investment, stockholders are as effectually deprived of their property as they would be if permitted to receive a reasonable compensation subject to be immediately taken from them and appropriated by the State. The injustice of the proceeding consists in depriving the stockholders of the entire value of their property, and not in the mode of its bestowment; and when this is done, it is to them quite immaterial how the income thus taken is employed. Perhaps the State of Wisconsin, if it shall be allowed to indulge in this species of confiscation, may upon reflection conclude it can make a better use of its "franchise" than is here attempted. As now employed, the income—or as it may on this theory be called the franchise, is absorbed in some small de-

gree in the carriage at insufficient rates, of persons not citizens of Wisconsin, and of property not belonging to them. It would be equally agreeable to the stockholders and bondholders of the Company, if the Legislature should permit reasonable rates to be charged, and as they accumulated, take and divide them fairly amongst the travelling and freight-sending portion of its citizens, and thus appropriate the entire spoils in harmony with that provision of the Act which discriminates in favor of the carriage of such freights as constitute the staple products of Wisconsin; or, if thought by its Legislature more just, the proceeds of its altered franchise and of our property might be paid into the Treasury of the State.

It is eminently desirable, before adopting this theory of Granger legislation, to discern, if possible, some plausible ground on which to place the proposition, that the right to receive compensation for the use of corporate property, or the performance of corporate service, is a franchise to be withdrawn or changed by the State at will, and to discover, if within the compass of human intelligence, some reason of at least apparent solidity why, the moment private individuals invest their money in railways, their natural right to receive income therefor is surrendered, and replaced by this franchise, which the State may so mould and employ as to divert into its own treasury, or at least from the owners of the property thus created, all profit or hope thereof.

Will it be said, in support of this doctrine, that railways are public highways, and, therefore, the property of the State, as has been urged by an eminent Senator of Wisconsin? If this be so, doubtless the State may control such property without resort to the pretext of so doing under the reservation contained in its Constitution. But on what foundation can such a proposi-

tion stand in a Court of justice? By the Constitution of that State it is absolutely prohibited from contracting any debt for works of internal improvement, and from being a party in carrying the same on, except as hereinafter stated. If it be said that the first clause of this prohibition would not be violated by its assuming ownership without payment or liability to pay for the railways within its borders, it would nevertheless violate the second clause of the prohibition by engaging in their management. If this difficulty could be obviated, by force of what consideration known to law or morals has any such ownership vested in the State? It is true that, to enable the corporation to secure a small portion of its road-bed, the State authorized the exercise of its right of eminent domain; but in delegating this the State lost nothing, and paid nothing, nor has it ever paid or advanced a farthing towards the construction of the road. To the same extent to which the Company exercised this right of eminent domain it is, and commonly has been, employed by manufacturing companies to take land for the purpose of flowing it with water; but it has never, I believe, been pretended that this vested their property in the State granting the right or authorized its Legislature to fix the prices at which they should sell their manufactured products. If the granting of charters be suggested as the consideration moving from the State, by force of which it may claim the property, or use or control of the property of the corporations it creates, the answer is that railway charters afford no different or better pretext for this claim than those of companies formed for banking or manufacturing purposes; and it is believed that never in the history of legislation has an attempt been made to fix a rate of interest below that prescribed by the general law as the limit of charge by

a banking institution, nor to fix the prices at which manufacturing companies should sell to the public their wares. The right to sell these at such prices as would yield a fair return for capital invested, and the right of incorporated banks to charge the usual lawful rate of interest, have never been regarded as franchises bestowed by the State and subject to be recalled or varied at its pleasure; nor have they ever been considered, so far as I am informed, proper subjects of State plunder or confiscation. Why, therefore, this odious and wicked discrimination between these several species of private corporations and against railway companies?

It is difficult to point out any reason why the same protection should not be afforded to the stockholders of each and all alike. On what then is the discrimination based? Is it exercised to the injury of railway companies because their property is capable of use for vast numbers, and is in many ways serviceable to every individual in the community? Whatever may be the pretext for this assault upon and appropriation of their property, I am persuaded the law as declared here will denounce and condemn it; and I, therefore, proceed to state such reasons as occur to me, why, under the power reserved to alter charters, the State has no power to fix the compensation of incorporated common carriers, unless expressly authorized to do so by the charter, and then not by virtue of its capacity as sovereign, but solely as a party to the contract between it and the corporation.

1st. There are many subjects to which legislative power does not extend, and among these may be mentioned its inability to transfer the property of A to B, or to take the property of A for public use without just compensation, which compensa-

tion it is powerless to fix, and especially it has no authority to do a judicial act. Hence it could not on petition adjudge that A should pay to B even the smallest sum, or that the latter should perform the most trivial act. So, too, it cannot make or alter contracts between individuals. Its functions are the enactment, not the construction or execution of laws.

2d. The ascertainment of what is a just and reasonable compensation to be paid to common carriers for services as such, is a judicial and not a legislative act, and the determination of this question must always be adjudicated and settled in a proceeding in which the person for whom the service was rendered is a party. Hence if the State and the corporation should by charter fix rates of compensation for such service, they would not bind the public, for it is the duty of common carriers—and this may be judicially enforced—to perform all services as such, for every person demanding them, for a reasonable compensation, to be fixed in case of dispute by courts of justice. The reason of this is obvious. A legislative body does not proceed by deliberate inquiry, upon proofs and a hearing of the parties, which is indispensable for the ascertainment of that just measure of compensation to which the carrier is entitled, and which the party availing of the service ought to pay. Thus, if the question should be presented to a court of justice whether the rates charged by the Chicago and Northwestern Railway Company before the Act in question, were reasonable, the judicial mind would inquire as to the amount of capital invested in the road and its equipment, the reasonable cost and risk of operating the same, the value of wear

and tear of road, machinery, &c., the gross annual receipts, and the probability of their diminution or increase in view of established facts; and if upon a fair estimate of all these elements of calculation it should appear that, deducting all expenses and risk, the rates charged would yield but little if any more than lawful interest to the stockholders upon their investment, such compensation would not by any respectable court be considered unreasonable or unjust. Such, in general terms, would be the mode of judicial inquiry, and from this it is evident that as a legislative body does not so proceed in its investigations, there is sound reason for holding that what is a reasonable and just compensation to the common carrier for services is a judicial and not a legislative question.

3d. It is well settled that the charter of a private, as distinguished from a public corporation—created for Government purposes—constitutes a contract between it and the State creating it, which could not be repealed, nor in any substantial respect altered or amended without consent of both contracting parties.

The corporation might, by misuse or non-use of its franchises, forfeit them, but this forfeiture the Courts only, and not the State, could adjudge. A charter, with a right reserved to the State to alter, amend or repeal it, is not the less a contract between the State and corporation because of this reservation. When this is inserted in the charter, or declared in the public acts or constitution of the States granting it, the reservation becomes a part of the agreement between the corporation and the State. It is not a right to be exercised as a part of the absolute power of the State, like

the exercise of its right of eminent domain, or its power to impose police regulations. These powers are exercised for the general welfare and cannot by the State be surrendered, and never could have been, to private persons or corporations for any consideration, however great. Over these subjects the State exercises, and ever must, absolute authority. They are sacred trusts for the benefit of the entire people which it is powerless to barter away. Hence all property, all franchises, may be appropriated by the State, in the exercise of this right of eminent domain, on making just compensation therefor; and without compensation all property and persons must submit to the exercise by the State of its power to impose regulations of police.

These observations illustrate how entirely different are these two powers and their purposes from a legislative authority to create private corporations. These may be so organized as to have perpetual succession without alteration of their charters, for the franchises to them granted rarely impair, and generally promote the public welfare. And the law which empowers courts of justice to annul charters when corporations abuse their franchises, has generally been supposed to guard sufficiently against the evils which might otherwise flow from irrepealable and unalterable contracts. This reservation of the right of one of the contracting parties to alter or amend the contract between them, is created by force of the contract, and could not exist but for the assent of both State and corporation thereto; for it is at the option of the latter whether it will or will not accept a charter containing such a provision. A State might, if it saw fit, authorize the corporators, by

vote of a majority, to alter, amend or put an end to their charter, and in such case their right so to do would rest solely on this provision of the contract.

The power of the State to do this rests upon precisely the same foundation, and cannot be exercised at its discretion without judicial control—as it may impose police regulations, or exercise the right of eminent domain. Justly and rightly viewed, therefore, a charter of incorporation which contains the reservation we are considering, is, in its entirety a contract, every provision of which, including this reservation, is subject to judicial control, and must be construed in subjection to constitutional provisions for the protection of contracts and property, and to the meaning and purpose of the parties, like any other agreement. When, therefore, Courts have considered what force shall be given to contracts, which in conformity to charters have been made between corporations and third parties, they have invariably said: this agreement by which the State may alter or amend its contract with the corporation, so as to vary its corporate rights and franchises, is made exclusively between the two, and cannot affect persons who before the charter was altered, and the power of the corporation varied, have contracted with it upon the faith of its ability to make agreements in the manner prescribed by that instrument.

4th. It is therefore to be considered and judicially ascertained what is the true legal effect of that provision by which the parties agreed, when the charter was accepted, that the State might at any time alter it, for the consequences of its repeal need not

be considered, inasmuch as that has not been attempted, and is not likely to be by any Legislature of any State; for such an act would at once remit to the stockholders absolute right to their property, subject to its just administration and control by courts of equity, and would by discontinuing the operations of its railway, subject the people of the State to great inconvenience and loss. Hence the clause authorizing the Legislature to repeal charters is one of very little consequence to the stockholders or creditors of railway corporations; for it is a power which if exercised would be quite sure to inflict more injury upon the State than upon the corporators. This, and the enormity of such a proceeding, unless in a case of flagrant misconduct by the corporation, will always protect it from extermination; but even this, which would enable stockholders and creditors to avail of their property, would be to them much less hurtful than such legislation, under the guise of alteration, as we are here considering.

The extent, therefore, to which this power of alteration by the Legislature may be exercised is to be judicially determined, for that body cannot on pretext of so doing, violate other constitutional provisions, or the most sacred rights of property. A few illustrations may not be inappropriate.

Thus if a bank were incorporated with such a reservation in its charter, would an Act of the Legislature which required it to loan half its capital to the State without interest, or at such a rate as the State Commissioners to be appointed by it might prescribe, constitute an alteration of its charter? And if a corporation were created subject to such reservation, having authority to flow lands for the purpose of securing water-power,

and having authority also to operate its machinery by steam, would a Statute forbidding it to use the power of water for that purpose be regarded as an alteration or amendment of its charter within the true meaning of the reservation?

Again, let us suppose that the State of Wisconsin were to prohibit the Chicago and Northwestern R.R. Co. from using the power of steam to operate its road, but with a view to encourage the raising of horses, were to require that the road-bed should be so changed that these animals could be employed thereon, would this in any sense be regarded as an alteration of its charter? Or suppose the Legislature should enact that its members might vote for directors at the annual meetings of the stockholders of the Company, and that their vote should elect a majority of the board for the management of its affairs, would this be regarded as a lawful amendment of the charter, enforceable at the suit of the State, or by legislators thus made corporators? Suppose again, that the Legislature should appoint three Commissioners to sit with the Board of Directors at all their meetings, exclusively to determine the kind of cars which should be operated, the kind of rails which should be used, who should also have authority to appoint master mechanics, superintendents and conductors of the road, with exclusive power also to say what compensation should be charged for the carriage of freight and passengers, leaving other duties such as providing moneys to operate the road, to pay interest on bonds, &c., to be performed by directors appointed by the stockholders; would such an injection of Commissioners for such purposes be alteration or amendment within the meaning of this reservation? Suppose again, that by express

statute these three Commissioners were to be charged with the exclusive duty of so fixing rates of compensation that they should produce a sum, the exact equivalent of what should be expended in operating the road, and keeping it and its cars in repair, would such an act constitute an amendment or alteration of the Act of incorporation? But suppose instead of this, the three persons thus appointed were charged with the power of fixing at their discretion, from which there should be no appeal, the rates of compensation to be charged, would this constitute an alteration or amendment of the charter? If so, these persons could without proof by, or hearing of, directors or stockholders, utterly destroy at will the power of the corporation to operate the road, or pay bondholders or stockholders—indeed could totally destroy their entire property and interests.

Can this Court believe—can it judicially declare—that the State in making this reservation believed it would acquire authority to do either of the Acts supposed, or in any manner to take from corporations the control or beneficial use of their property, and without doing this or any such grave injustice, may not the reservation in question be so construed as to confer upon the State authority to make all needful and just alterations of the charter?

It is certain, in view of many other illustrations which might be supposed, that there is a limit to this power to alter and amend, as was said by the Supreme Court of the United States in the case of Miller *vs.* the State, 15 Wallace, p. 498, and by Chief Justice Shaw in the case of the Commonwealth *vs.* Essex Co., 13 Gray, 252.

In the latter case the Chief Justice, after saying it was difficult to define this limit, suggested that the

rule to be extracted might be that where under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted. And the Supreme Court of the United States in the case cited, after suggesting the same limitation in similar language, adds "but it may be safely affirmed that the reserved power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant, or to secure the due administration of its affairs, so as to protect the rights of stockholders and creditors."

These general observations are nevertheless sufficiently precise to furnish a rule for the disposition of this case. There is a limit to this reserved right of one party to the contract to alter it, and that limit is to be judicially ascertained and defined. Rights and property which have become vested in the corporation in pursuance of the terms of its charter, cannot be taken away, nor can it be deprived of the use thereof, for that would be practically taking the property itself. Alterations to almost any extent may be made to carry into effect the original purposes of the grant, or to secure the due administration of the affairs of the corporation for the security of creditors and stockholders. These limitations are in exact harmony with the intent of the parties to the contract. The original purpose of the grant is to be effectuated by such amendments as tend to secure that result. No disturbance of vested rights, no taking of the property of the corporation acquired in pursuance of its charter, is to be permitted, under pretence of alterations; whilst

changes to preserve the rights of stockholders are to be liberally allowed. This is a fair, a just mode of construing the contract which the State offered and which the corporation accepted. By the aid of these rules, and bearing in mind that the State can only make alterations and amendments by force of the contract authorizing them, and not in the exercise of an arbitary sovereign power, we shall be able to draw lines of limitation for the government of this case, which clearly exclude the Act in question.

When this charter was granted, there existed certain fundamental rules for the protection of property, founded in the principles of eternal justice and imbedded in the Constitution of most States, including Wisconsin, and of the United States, which the parties to the charter had in mind, and in view of which they contracted, and by which their contract is to be construed and controlled. Private property could only be taken for public use, and then only upon making just compensation to the owner thereof. Nor could the property of any person be taken without due process of law. In view of these provisions, if the State of Wisconsin had, by Act of its Legislature, provided that the steam-power of an incorporated Company might be used by mechanics or others at certain rates of compensation, such use would have been an appropriation of property without due process of law, and the authorizing of it would have been utterly void. Such too would have been the fate of a Statute requiring the owner of any kind of property to lease or permit others to use it without compensation, or at rates prescribed by the Legislature or its agents.

To possess the title to property without the power to manage it, control its use and the profits thereof, subject only to the general law of the land, is a worthless privilege—a sham of no value, and hence the fundamental law guarantees not only title in the owner, but his right, absolutely, to control and use his own property. When the charter of this Company was granted, this right to the management and use of property was well under stood by both parties, and expressly recognized in that instrument. The stockholders who were to furnish the money to build and equip the road, were by themselves and by directors to be by them chosen, expressly authorize l to manage and control all the property and affairs of the corporation, and to fix the rates of compensation to be received for its use, and for the services of its hired servants. When this property was acquired it became, to all intents and purposes, private property, subject to a limited public use, vested in the corporation for the benefit of the stockholders, and with this ownership, and as an inseparable atterdant upon it, was the absolute right to manage, control and use it, subject to the purposes for which the Company was organized; and to fix and receive compensation for its use. Such were the rights at that time of all owners of property; and these rights became inseparably attached to the property of this corporation the moment it was acquired, in pursuance of the terms of its charter; and these rights thus acquired and vested, in the language of the Supreme Court of the United States, and of Chief Justice Shaw, could not be taken away or destroyed under the reservation in question.

Having thus presented some general considerations, for the purpose of illustrating the nature of and title to corporate property, I shall attempt to state with precision the exact conditions under which the corporators, when it has been acquired in strict conformity with their charter, are exclusively entitled to its enjoyment and control, subject to no interference by State legislation.

First.—The State of Wisconsin has contributed nothing whatever towards constructing, equipping, maintaining or operating the roads of the Chicago and Northwestern Railway Company. It has, it is true, conferred upon the Company authority to take for its road-bed land belonging to private persons, on paying them full compensation therefor; but this has cost the State nothing whatever. It has also conferred upon the corporation certain franchises—commonly bestowed—one of which is expressly, or by implication, exemption of the stockholders from personal liability for certain debts to be contracted.

Under this charter and in precise conformity with its provisions, the corporation has proceeded to purchase and acquire real estate in fee simple—to build thereon numerous costly structures, to equip its road at vast expense, and all this with money furnished by its stockholders and bondholders. This property thus acquired, has become absolutely vested in the corporation for the benefit of the corporators, and should the Legislature of Wisconsin pass an Act in terms forfeiting to the State one dollar of it, such Act would be utterly void. If it should by statute declare that the corporation should convey to the State a single passenger or freight car, or one of its most insignificant depot buildings, that provision of the

Constitution which prohibits the taking of private property, except by due process of law—that which prohibits the taking of private property for public use except upon making just compensation, would be violated; and so they would be should the State attempt by legislative enactments to acquire the transfer for its use, or for the use of any person or corporation, of such car or depot building.

And why this inviolability? Not because it is conferred by the charter of incorporation, but because the Company being authorized to purchase, hold and use property for its purposes, acquires an absolute right thereto as owner, and thereupon is protected as such by the constitutional provisions referred to.

In illustration of the marked distinction existing between the ownership by a corporation of its property thus acquired and of its franchises, it is only necessary to say that the latter being derived from the State by contract, may by the courts, for sufficient cause be forfeited, and may under certain conditions be by legislative enactment altered or withdrawn; but neither this forfeiture, alteration or withdrawal entitles the State to acquire title to or control over any portion of the property of the corporation. This to the extent of its full value, for the purpose of all its uses, is to be faithfully applied for the benefit of stockholders and creditors. The broad distinction here noticed between title to and enjoyment of the property of a corporation, and of its franchises, is maintained throughout its entire career. The latter being derived from the State, may under certain conditions be resumed by the State. The former is derived from stockholders who contribute it on the faith that it

is to be held and controlled by them through agents of their selection, substantially as it would be if the title thereto were in them.

Thus under a power reserved in the charter, that the State might alter or amend it, the franchise by which stockholders are exempted from liability for debts contracted by the corporation might, perhaps, as to subsequent contracts, be changed, so as to impose such liability; but this would simply be a change in the contract between it and the State, and the withdrawal of a privilege conferred by the latter. So also when the charter exempts the property of a corporation from taxation by the State, this franchise, which it has been gravely doubted if the State may grant, might perhaps be withdrawn or modified under the reserved authority: but in these supposed cases the State is modifying the contract by a resumption of what it gave to, or stipulated to confer upon the corporation, and is not attempting to take without compensation property in which it never had an interest. The right to alter, amend or repeal thus reserved, is, at the most, but a right to change or terminate the contract between the State and corporation, not a right to take property vested in the latter in precise conformity with its powers; nor a right to confer its use upon the State, or upon any private person; and of course does not authorize the State to take possession or control of it, or to fix the rate of compensation payable to its owner for its use; for this would, at the pleasure of the State, result in confiscation.

Second.—If I have been successful in the argument and illustrations employed, they lead to the

conclusion that the construction and operation of an agreement by a Corporation when it accepts its charter, that the State may alter, amend, or repeal it, is to be by the Courts of justice judicially defined, ascertained and determined; and is not to be adjudged and enforced at the arbitrary will of the Legislature. The State is a party to the agreement, and cannot sit upon it in judgment. It is to be defined and judicially enforced in accordance with the intent of parties, so far as this can be ascertained from the language employed by them in making it. Its operation is also to be controlled, if this intent and meaning, or the language employed, be doubtful, by those great principles which in most, if not all, civilized countries, have by constitutional, legislative, or judicial authority, been established for the protection of private property. The franchise granted by the State is the privilege conferred upon certain persons of being a Corporation, and as such, of accomplishing the purpose of its creation, in which the public generally have an interest. If the purpose be to construct and operate a railway, stockholders are usually expressly authorized to manage by themselves or by their Directors its business and affairs; and to fix the rates of compensation they are to receive for the carriage of passengers and freights. Such a provision is, however, quite unnecessary, for the franchise to be a Corporation for such a purpose would necessarily imply it was to be so governed by its stockholders as to accomplish that purpose. They would need no authority by any provision of the charter to enable them to control the property and means they might contribute to construct, equip and maintain the railway, for their title to such property being derived

from sources other than the State, they would be protected in its use and control by the Constitutional provisions I have mentioned. It is clear, therefore, that as the property of such a Company is not acquired from or by force of its contract with the State, any alteration or amendment of its charter could in no substantial respect affect its right of ownership and absolute control over such property as had become vested in it. It will hardly be denied, therefore, that as the control and beneficial use of property is incidental to ownership, without which the latter would be worthless, that provision of the charter of the Chicago and Northwestern Railway Company, by which it was expressly authorized to fix rates of compensation for the carriage of freight and passengers was unnecessary; for without it this right would have been vested in the Corporation. It was indeed but a right to contract with those who should desire its services as a common carrier for compensation as such, and as it would be inconvenient to make contracts with each person who should need such services, the Corporation would have been entitled to establish its rates of charge, subject only to the legal duty applicable to all common carriers, that its rates should be reasonable.

When, therefore, this Corporation was created such, it came under subjection to this obligation imposed by the common law, and if its charges should be unreasonable, the party affected thereby has his judicial remedy before tribunals where both parties can be heard and the question decided upon proofs.

Third.—The insertion in the charter of this provision, authorizing the Company to fix rates of

compensation, was therefore in substance inoperative and useless except to show the intent and meaning of the parties; for it conferred no power which the Company would not have enjoyed without it, and afforded no exemption whatever from the common law liability I have mentioned; for the corporation, notwithstanding this, was bound to carry persons and freight at reasonable rates, to be judicially determined at the will of those affected. It has been suggested that this would be a tardy, expensive and unsatisfactory remedy. It is quite true that the exercise of Lynch law by a mob is quick and cheap as compared with the somewhat tedious and expensive modes of judicial proceeding. But the latter has usually been preferred by just and thoughtful men, as it gives the accused an opportunity to introduce evidence and to be heard in his defence—the embarrassment of which a mob rarely permits. So in the case at Bar, it is certainly a more summary, and doubtless to some persons a more satisfactory mode to fix the rates of compensation the Company may charge for its risk and service as a common carrier by legislative action or by State agents, where only the popular cry is heard—than in a Court of justice, where the rights of the company and its stockholders can be presented and considered.

Fourth.—It is, however, as before suggested, decisive against the power of the State to fix or enforce these rates, that at the time the charter was granted, the compensation which common carriers were entitled to charge was a judicial and not a legislative question—to be decided by Courts of justice. It is true that if by the contract between the State and the corporation the former

had been expressly authorized to fix these rates, that power might have been exercised. But no such authority was given, and indeed by the very terms of the charter it was agreed that these rates should be fixed by the Company—an agreement, however, which was but declaratory of a right which, in its absence, would have existed in full force. Without such right, the property of the Company would be substantially worthless; for whilst men are willing to invest in railways, subject to the common law rule, to be judicially enforced, that their charges must be reasonable—a rule which would, of course, recognize the justice of allowing the stockholders to receive in dividends a fair interest upon the moneys by them advanced—they would decline so to invest at the peril of having a Legislature or its creatures, without appeal, without responsibility—possibly to conscience, certainly to law—prescribe rates to be varied, perhaps, by every popular breath, certainly by every outbreak of popular prejudice and clamor against railways.

In view of the judicial nature of this question of compensation—settled so to be by the law of the land, by the Courts, probably, of every State in the Union, by the English Courts—in view, also, of the fact that when this corporation was created, the right to control property and to fix the compensation for its use was unrestricted in the owner thereof, by force of Constitutional provisions, and also upon general principles of justice and right; and in view, also, of the fact that the parties to this contract expressly stipulated that this right should forever remain in the Company, can it be doubted that both parties intended that this power to alter or amend should never be so

employed by the State as to fix these rates of compensation? That the parties intended to exclude such an authority seems entirely clear; and that, independent of such intent, it could not be exercised, is apparent from the considerations before suggested, and from the further illustration that agreements between the Company and persons employing it as a common carrier, it was not competent for the Legislature to make; for, as was said by Bronson, J., in delivering the opinion of the Supreme Court of the State of New York, in Taylor *vs.* Porter, reported in 4th Hill, page 140, "the power of making bargains for individuals (and a private corporation, such as a railway company, acts as such—53 N. Y. Rep. 141) has not been delegated to any branch of the Government, and if the title of a man, without his fault, can be transferred to another, it may as well be done without as with compensation." In futher illustration, it may be added, that if the State could, as between it and the Company, fix rates of compensation, these, if unreasonable, would not be binding upon third persons employing it, who might still insist upon having the question tried and decided by the Courts; and it is submitted that few lawyers can be found who would advise that to such an action the Statute of the State fixing rates of compensation, or rates fixed by its commissioners, could be pleaded in bar. (See in this connection, Opinion of the Supreme Court of the U. S., in case of State Freight Tax, 15 Wallace.)

To prohibit a person or corporation from making bargains for the compensation to be received for property owned by either—to prescribe what sum may be received therefor, and prohibit the receipt

of more under heavy penalties, is certainly depriving such person or corporation of property without due process of law, for to deprive one of any part of the value of the use of an estate owned by him, is to deprive him of property therein.

If, therefore, a State is powerless, as it clearly is, to fix the prices a manufacturing company may receive for the cloths it makes; powerless to fix the rent a land-owner may receive for its property, is it not equally powerless to fix rates of compensation payable to common carriers? And if in the two cases first supposed, such acts would be in violation of the Constitutional provision, which declares that no State shall deprive any person of property without due process of law, which phrase means without due and orderly proceedings in a Court of justice, (4th Hill, 146–7,) is it not apparent that by no reasonable construction can the reservation we are considering permit a State to commit so grave an offense as to deprive a corporation of its property under a pretext of altering or amending its charter? Will not Courts charged with the construction of contracts, empowered to administer justice, struggle if need be, against a construction which leads to consequences so oppressive, unjust and destructive to the interests of the Northwestern Railway Company, its creditors and stockholders?

Finally, the Court perceives that the purpose of this branch of the argument is to establish, that for various reasons, as between a corporation, its stockholders and the State of Wisconsin, the latter cannot so alter or amend a charter under this clause of reservation as to deprive the corporation of any of its property acquired in pursuance of its charter and absolutely owned by it, or of the un-

restricted use and enjoyment thereof. It cannot take such property or the possession thereof—it cannot bestow it or its use upon others, it cannot direct its application to a purpose other than that to accomplish which the charter was granted, and it cannot destroy or cripple the ability of the Company to effect this, by taking through its Legislature or other agents, such control of the property of the Company as deprives it of such reasonable compensation for the use thereof as the law of the land, administered by Courts of justice, permits common carriers to receive. And I think it will be found, that no respectable Court has ever so construed this right to alter or amend charters, as to permit the State to overstep the limitations I have here attempted to prescribe.

There are several cases where alterations and amendments have been adjudged valid; and several where the contrary has been held; but in neither of the former have the Courts decided that a State could seize, take control of, or prescribe the compensation for the use of property of the corporation, by it acquired in pursuance of its charter, whilst in every instance where the question has arisen, whether the State might do either of these acts, the decision has been, as I believe, adverse to its right.

(1.) I will briefly call attention to a few cases which may be relied upon by the defendants:

In that of Scott *vs.* The Supervisors, 16 Wallace, Mr. Justice Strong, in delivering the opinion of a majority of the Court, used this language: "The Railroad can therefore be controlled and regulated by the State. Its

use can be defined—its tolls and rates for transportation may be limited."

It is believed that in no other decided case has such language or its equivalent been employed by a Court or by any Judge thereof; nor was the question as to the authority of the Legislature to alter, amend or repeal a charter in any aspect of that case before the Court, or necessary to its decision. The expression was employed merely to illustrate the public character of railway corporations —the only question in the case being whether a Statute of Wisconsin, authorizing the use of county obligations in aid of the construction of a railway, which in consideration of such aid, was to carry wheat at certain specified rates—the issue of such obligations having been assented to by a vote of the county—was Constitutional; and a majority of the Court held it was upon the ground that State or municipal aid might be granted for such a purpose.

If the Court will examine the cases of

Miller *vs.* The State, 15 Wallace, 478;
Holyoke Co. *vs.* Lyman, 15 Wallace, 560;
Tomlinson *vs.* Jessup, 15 Wallace, 454;
Penn. College Cases, 13 Wallace, 209;
Sherman *vs.* Smith, 1 Black, 587;
Reciprocity Bank, 22 N. Y., 9;
Dodge *vs.* Wolsey, 18 Howard, 336; 14 Barbour, 449; 10 Barbour, 260; 8 Barbour, 363;

they will be found to decide nothing against the limitation of legislative power, as I have endeavored to state it.

(2) But if the Court will also look at the cases of Sage *vs.* Dillard, 15 B. Monroe, 340; Commonwealth *vs.* Essex Co., 13 Gray, 239; Miller *vs.* Erie R.R. Co., 21 Barbour, 513, (cited and approved in 15 Wallace, 498,) they will be found fully to establish the proposition stated—that under this reservation the power to destroy or impair vested rights of property cannot be exercised by the State; and indeed the doctrine of all these cases is in substantial harmony with the opinion of Chief Justice Shaw, in 13 Gray, and the principles therein laid down fully support the views I have ventured to insist upon as to inviolability of the right of the Chicago & Northwestern Railroad Company to control the property in it vested, and to fix, subject to the rule aforesaid, the compensation for its risk and services as a common carrier.

Fifth.—Whether the power to prescribe rates of compensation for the services of common carriers be a legislative or judical question; whether it is to be exercised by the State as sovereign, or as a party to the contract; and whether, in view of what has been urged, the Legislature of Wisconsin may or may not interpose and fix such rates of compensation, it is nevertheless submitted, that this power cannot be delegated to persons appointed by the State, and hence that the admitted purpose of the Railway Commissioners, defendants herein, to exercise it, is unlawful, and should be prevented.

VI.—For the purpose of presenting to the Court the remaining, and not the least important, questions involved

in this case, which are that the Act in question is utterly void, because it impairs the obligations of contracts entered into between the corporation, the State of Wisconsin, and the United States—the corporation and certain of its stockholders, who are appellants here, and also between the corporation, its bondholders and mortgagees,—I must refer to the history of the organization of the Chicago and Northwestern Railway Company, which, as before stated, is composed of at least two corporations created by the laws of Illinois, and of three or more created by the State of Wisconsin, such organization being the result not only of the Statutes of those two States, but of agreements entered into in pursuance of and upon the faith thereof between the several companies thus consolidated and their stockholders; and when we have traced this organization, it will be found that we have to consider not merely the relations of a single State to a corporation of its creation, but those of this consolidated Company to its stockholders, bondholders and mortgagees, their several relations to each other, and also the relations, rights, obligations and duties of the States of Wisconsin and Illinois to each and all of these, and in view of their joint legislation to each other also.

On the 3d June, 1856, as before stated, by an Act of Congress, entitled "An Act granting public lands to the State of Wisconsin, to aid in the construction of railroads in said State," and printed in volume 11 of the United States Statutes at Large, page 20, there was granted to the State of Wisconsin certain alternate sections, or parts of sections of land, for the purpose of aiding in the construction of a railroad therein mentioned; and by the Third Section of the Act, it was expressly declared that the land thereby granted to the State, should be subject to the disposal of the Legislature thereof, *for the purposes of the said Act*

mentioned, but no other; and that the railroads to be constructed should remain public highways for the use of the Government of the United States, free from toll or other charge upon the transportation of property or troops of the United States.

The State of Wisconsin accepted these lands upon the aforesaid trust, and could execute it only by constructing and maintaining the railroad as required, or conveying the lands to a corporation having capacity so to do, and thus to render the required consideration; and such capacity could only exist in a corporation having perpetual succession and power so to manage its roads as forever to keep them open and in working order.

The State, by virtue of Section 10, Article 8, of its Constitution, had ample authority to execute the trust in either mode. That Section declares, that "the State shall never contract any debt for works of internal improvement, or be a party to carrying on such works. But when grants of land or other property shall have been made to the State, especially dedicated by the grant to particular works of internal improvement, the State may carry on such particular works, and shall devote thereto the avails of such grants, and may pledge or appropriate the revenues derived from said works in aid of their completion."

The Legislature of Wisconsin attempted faithfully to perform this trust and duty by an Act, passed under authority of this clause, and approved October 11, 1856, entitled "An Act to execute the trust created by the Act of Congress, entitled 'An Act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State,' approved June 3, 1856," by incorporating the Wisconsin and Superior Railroad Co., and granting a portion of said lands thereto.

By the very title of this Act, the State professed to be acting in the discharge of the trust thus devolved upon it; and a careful examination of the Act will show that the Legislature created an artificial being, and endowed it with ample power to perform its duties in exact harmony with the requirements of the Act of Congress and of the aforesaid Constitutional provision. The Corporation thus created was to have perpetual succession, and was to enjoy all the rights, powers and authorities, privileges, franchises and immunities necessary and proper to the full and complete possession, exercise and enjoyment of those expressly conferred. Without perpetual succession it could not have executed the trust which it was the duty of the State of Wisconsin to effectuate.

It was to be capable of contracting and being contracted with, for, and as to all the purposes in the Act contained, and was perpetually to have, use and enjoy, maintain and operate a railroad, beginning and terminating as in the charter is declared. It was expressly declared also that the Company should have perpetual right, power and authority to transport, take and carry property and persons upon the said roads by the force and power of steam, or otherwise; and also to have the power and authority to operate its said roads, or either of them, in connection with any and all other railroads which might cross, come up to, or connect with such roads or either of them *upon such terms as should be mutually agreed upon by and between said Companies.* On the completion of said road, or any part of it, it was declared that the Company should be authorized and empowered *to demand and receive such sum or sums of money for the transportation of persons and property, and for the storage of property, as it should from time to time deem reasonable.* Such lands as the Company should obtain for the purpose of building

and operating its roads, it had authority to acquire in fee simple, absolute and forever; and it was expressly invested with the title to the land and all and singular the rights, privileges and immunities granted or conferred, or intended to be granted or conferred, by the Act of Congress; and was to be subject also to all the restrictions, impositions, duties and obligations contained in such Act; *it being expressly declared in said charter that the said lands so granted by Congress were conveyed by the State, to the Company, in consideration that the latter should comply with the terms of the grant thus made, and of the Act of Congress.* And it was also expressly provided that all the affairs and business of the Company should be conducted, managed and carried on by a Board of fifteen Directors, who should be stockholders thereof, and that such stockholders should be entitled to one vote for each and every share of stock held by them. The Corporation was also authorized to borrow any sum or sums of money from any person or persons, to make notes, bills bonds, mortgages, and all other papers or securities of any amount or kind, as might be deemed expedient by the Corporation, in consideration of any loan or any discharge of any liabilities it might incur in the construction, repair, equipment or operating of the road. And was also empowered to prescribe the sum or sums for which each of the bonds should be issued, and the time or place, or places, when and where the principal and interest on the same should be payable, and, in its corporate capacity, to make, execute and deliver mortgage or mortgages, deed or deeds of trust upon the whole or any part of its railroad constructed, or authorized to be constructed, and upon the lands of the United States granted to said Corporation, and upon any other or all of its estate real, personal or mixed, in possession or expectancy, *and to confer upon the trustee or mortgagee*

full and ample power to enter in and upon, and take possession of, have, use, enjoy, sell and dispose of the whole or any part of said railroad, estate, real, personal or mixed, together with the functions appertaining to said railroad, and all corporate or other franchises, rights and privileges of said Railroad Company.

The duration, powers, franchises and obligations of this Company have been thus particularly stated, because they have been, by the Legislatures of Wisconsin and Illinois, expressly conferred upon the Chicago and Northwestern Railway Company, as now organized. It is to be noted that the duty was devolved upon the Wisconsin and Superior Railroad Company by Act of Congress, and by the State of Wisconsin, forever to keep open the roads to be constructed, and to maintain them as a fit and proper highway for the purposes mentioned; and, as a full consideration for the performance of this duty, there was vested in the corporation the title to the land thus granted in fee simple, with authority to sell the same at pleasure. From the performance of this duty and obligation, thus contracted by the corporation, it could never relieve itself. Nor, could the State of Wisconsin, having accepted this grave trust, and made the grant in conformity therewith, to a corporation of its own creation, ever so interfere with it in any manner as to deprive it of the power to perform the contract made upon sufficient consideration with the State, and which the State had authorized and required it to make with the government of the United States. To deprive it of the necessary means of performing this undertaking, would be a plain violation of the Constitution of the United States. If it shall be urged that by the Constitution and laws of Wisconsin its Legislature may alter or repeal this act of incorporation, the answer is: first, this corporation is not subject to such reservation; and

second, it cannot do this in violation of the trust it undertook to perform for the benefit of the United States, and in violation of a contract entered into by the State with a corporation expressly created by it for the purpose of performing that duty to the United States.

I have stated that an examination of the charter of this corporation will show that the powers and duties conferred upon it were in precise harmony with the duty of the State of Wisconsin, faithfully to execute this trust. For, to enable the Company to perform its obligation by keeping the railways it was to construct, perpetually open as highways, for the benefit of the government of the United States, it was indispensable that it should have the power perpetually to manage and operate them; and we find that the Company was to be absolutely governed by its board of directors, to be elected by its stockholders, and might demand and receive such sum or sums of money for the transportation of persons and property, and for the storage of property as *it* should, from time to time, deem reasonable. It was, moreover, empowered to mortgage not only all its property and all its franchises and privileges, but by the very terms of the Act the mortgagees or trustees, who might stand in that relation, were to be permitted to enter into and upon the railway and all the property of the Company,—to enjoy all its privileges and franchises which, of course, would include the right of charging and receiving such sums for the transportation of passengers and freight as they shou'd see fit. And they were also authorized to sell and dispose of the whole or any part of the railroad estate, real, personal or mixed, together with the functions appertaining to such railroad and all corporate or other franchises, rights and privileges thereof.

In presenting to the Court the proposition that the Act in question is void because it impairs the obliga-

tions of contracts in violation of the Constitution of the United States, I insist:

That the State of Wisconsin has, upon abundant consideration, so contracted with the Chicago and Northwestern Railway Company and its stockholders, that its obligations will be impaired, and the property of the Company thereby rendered worthless if the Act in question shall be enforced.

1st. Although a right is reserved to the State to alter certain charters of incorporation, it is under no obligation ever to do either, and hence it may perpetually refrain therefrom. It is quite clear also that this privilege of alteration is entirely consistent with the power of the State to make contracts upon a valuable consideration, as well with corporations as with natural persons; for as was said by this Court in State Bank of Ohio *vs.* Recp, 16 Howard, 389, "There is no constitutional objection to the exercise of the power to make a binding contract by a State. It necessarily exists in its sovereignty, and it has been so held by all the courts in this country. A denial of this is a denial of State sovereignty. It takes from the State a power essential to the discharge of its functions as sovereign. If it do not possess this attribute, it could not communicate it to others. There is no power possessed by it more essential than this." And in the same case the Court said, "A contract between the State and individuals is as obligatory as any other contract. Until a State is lost to all sense of justice and propriety, she will scrupulously abide by her contracts, more scrupulously than she will exact their fulfilment by the opposite contracting party." And in Fletcher *vs.* Peck, 6 Cranch 135, Chief Justice Marshall said: "The

principle asserted is that one Legislature is competent to repeal any Act which a former Legislature was competent to pass, and that one Legislature cannot abridge the powers of a succeeding Legislature. The correctness of this principle so far as respects general legislation can never be controverted. But if an act be done under a law a succeeding Legislature cannot undo it. When then a law is in its nature a contract, a repeal of the law cannot divest those rights, and the act of annulling them, if legitimate, is rendered so by a power applicable to every individual in the community."

And in the same opinion he says: "Whatever respect might have been felt for the State sovereignties, it is not to be disguised that the framers of the Constitution viewed with some apprehension the violent acts which might grow out of the feelings of the moment, and that the people of the United States in adopting that instrument have manifested a determination to shield themselves and their property from the effects of the sudden and strong passions to which men are exposed. The restrictions on the legislative power of the States are obviously founded on this sentiment, and the Constitution of the United States contains what may be deemed a bill of rights for the people of each State."

It needs no argument to establish that a State may make a binding contract with a corporation, and it is submitted it may do so in any form either within or outside of the charter. Thus if by that instrument it should be stipulated that in consideration of the payment of a certain sum of money actually received by the State, it would levy no taxes upon the corporate property for the

period of ten years, or that in consideration of a like exemption a Railway Company would during that period transport over its road all property of the State, free of charge, would not these stipulations constitute a binding contract, operative alike upon State and corporation; and would the fact of their incorporation in charters impair their force? We should not forget the purpose of the reservation in question. It was not designed to relieve the State from its obligation faithfully to perform contracts founded upon considerations paid or which might be exacted from corporations. By a fair and indeed necessary construction of the reservation, all such contracts must be excepted, and only those provisions of charters be included which come within the supposed mischief intended to be remedied; and I am sure it cannot be successfully contended that any respe table State ever deemed it a wrong to be compelled to discharge its honest obligations, whether to corporations or natural persons. The design was to be relieved from the doctrine of the Dartmouth College case, and not to be incapacitated from making contracts with corporations. Such corporate franchises as were ordinarily conferred upon the general consideration of advantage to the public, were to be subject to alteration and withdrawal; but no one can justly insist that a State which had for an a lequate sum stipulated in the charter of a corporation that it should be exempt from taxation for the period of ten years, could in violation of this enforce payment of taxes within that period. Other illustrations of binding contracts embodied in charters might be put, but it is deemed unnecessary, for whenever a State for a sufficient consideration makes a contract in any form with a

corporation, which if made with an individual would be binding, such contract the State must perform; and where the State has by contract with a corporation of its creation exacted from it an agreement to do certain acts for third parties who have a right to exact performance as against the corporation, the State cannot so cripple or impair the capacity of the former as to prevent it from discharging the obligations thus imposed.

2d.—In view of these general observations I now proceed to call the attention of the Court to facts which establish such contract between the State and the Chicago and Northwestern Railway Company and its stockholders, as is protected by the Constitution of the United States, and will be impaired or rendered worthless if the Act in question shall be enforced.

By the Act of Congress, of June 3, 1856, before mentioned, there was granted to the State of Wisconsin, to aid in the construction of Railways, certain sections of land upon the express condition that it should be subject to the disposal of the Legislature thereof for the purposes in the said Act mentioned, but no other; and that the railroads to be constructed should remain public highways for the use of the government of the United States, free from toll or other charge upon the transportation of property or troops of the United States. On the 11th of October, 1858, in execution of said trust the Legislature of Wisconsin passed "An Act to execute the trust created by the Act of Congress, entitled 'An Act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State,' approved June 3d, 1856, by incorporating the Superior and Wisconsin Rail-

road Company, and granting a portion of said lands thereto." In receiving these lands the State became bound to employ them for the purposes mentioned and no other; and this was to aid in the construction of railroads which should remain (of course forever) public highways for the use of the Government of the United States, free from toll or other charge for the transportation of property or troops to them belonging; and it was expressly declared in the charter of the corporation created to execute this trust, that the lands so granted by Congress were conveyed by the State to the Company in consideration that the latter should comply with the terms of the grant thus made, and of the Act of Congress. The corporation was by the terms of its charter endowed with power to perform the obligations thus devolved upon it by the State, on condition of doing which it was to own and possess the lands thus conveyed in fee simple. To enable the corporation to discharge this duty, it was declared to have perpetual succession; for without this it could not maintain the railroad as a perpetual highway for the use of the Government, and it was moreover expressly declared that all the affairs and business of the Company should be managed by a Board of Directors who should be stockholders thereof; and among other powers, that it might demand and receive such sums for the transportation of persons and property, and for the storage of property, as it should from time to time deem reasonable. Other provisions its charter contained not necessary to be here particularly stated; but from what has been set forth it is quite apparent,

FIRST.—That in exacting from the corporation its pledge perpetually to maintain its railroad for the free use of the United States as stipulated, as a consideration for the conveyance of said lands, the State came under the most solemn obligation to the Company to permit it to enjoy such of its stipulated privileges as would enable it to perform its contract with the United States, and with the State itself. The latter was bound and had constitutional power to use the lands it received for the construction of such a railroad for such purpose as was indicated; and until conveyed to the Company, they were held in trust for that purpose. When so conveyed, the trust and duty devolved on the corporation, which undertook in consideration of the grant, and of course in reliance upon the stipulations in the charter, which should enable it so to do, faithfully to execute this trust, and to perform the obligation cast upon it to the United States, failing to do which it would be responsible for its default to the Government. And yet in the face of this agreement with the State, and with the United States, it is here asserted that the State of Wisconsin might at any time after granting the charter, and after the Company should have disposed of the lands granted by the Government, repeal its charter, or so violate its provisions as utterly to disable it from executing the trust, or performing the contract it had assumed. May the State, by force of the reservation relied upon in violation of its contract with the Company, interpose and fix the compensation by it to be received, so low as to render it impossible for it to maintain its railroad in conformity with its obligations? For if they may by

the State be fixed at all, they can be so reduced at its pleasure as to effect this result.

Does not the unalterable contract between the State and Corporation forbid such interference? For it is quite clear the latter cannot by any lawful means relieve itself from payment of the consideration due to the Government for the lands thus conveyed; and this being so, it is difficult to understand why there should not be a corresponding obligation on the part of the State equally binding, not to take from the Company its stipulated and necessary means by which alone it will be enabled to perform its contract. If the Act in question shall be enforced, this power of performance will be taken away.

There are two aspects in which the case on the facts just presented may be viewed. One suggests most forcibly that, by a valid contract between the State and the Corporation, the former agreed that the latter should enjoy the means stipulated by the Charter in consideration of its performing the trust which the State had assumed towards the United States; and the other supports with sufficient force the proposition, that it could not have been the intention of either party to the Charter, that under authority to alter corporate franchises there lurked the power to fix rates of compensation by the State or its agents.

SECOND.—Beyond this, however, there is an objection to the law in question which, it is submitted, cannot be overcome. The Corporation was organized to execute the trust created by said Act of Congress, and this was to be

executed by such instruments as the State saw fit to select under and by virtue of the Constitutional provision aboveset forth, which conferred the necessary authority for that particular purpose upon the State. Thus acting, it was the duty of the State, and it had the power, to create an instrument having capacity to execute the entire trust and duty assumed by the State by the acceptance of said lands; and this could only be by a Corporation having perpetual succession and the continuing means of performance; and all this the Charter stipulated. It was not granted under Section 1, Article 11, of the Constitution, which declares that all general laws, or special Acts of Incorporation, enacted under its provisions, may be altered or repealed by the Legislature *at any time* after their passage. Could it have been the purpose of the State so to do as to this Charter? Was it not indipensable to the execution of the trust that, as the Corporation had incurred a permanent and very onerous duty to the United States, it should be empowered to execute it? It is therefore submitted that the State could neither alter or repeal either of the substantial provisions of the Charter in question.

THIRD.—Thus far I have proceeded as if the question in controversy was one simply between the State and the Wisconsin and Superior Railroad Company, *to all the rights, duties, obligations, privileges and property of which the Chicago and Northwestern Railway Company has succeeded.* I now enter upon a somewhat broader field, which presents new rights acquired by itself and its

stockholders, and duties incurred by the State towards them, clearly resulting, it is submitted, in such obligations as establish, independent of the ground last stated, a contract between it and them which cannot be lawfully impaired.

It will be remembered that the Chicago, St. Paul and Fon du Lac Railroad Company was composed of two Corporations, one created by the laws of Wisconsin, the other by the laws of Illinois, consolidated by agreement between the several stockholders, who were authorized so to do by the laws of those States, the policy and purpose of both being, by this joint legislation, to make a continuous and connected line of railway between and within them. In completing this consolidation, stock was issued in the new Company in exchange for that of the old,—the liabilities of the old Companies were assumed by the new, and such a merger and admixture of interests and property took place, represented by the new stock thus issued, that it thereafter became impossible to discriminate between what had belonged to the Illinois Company and what to the Corporation chartered by Wisconsin; and under these circumstances the Company, as consolidated, was authorized to, and doubtless proceeded to, make bonds and to execute mortgages upon its property.

In 1857, it was authorized by the States of Wisconsin and Illinois, actuated by the policy aforesaid, to consolidate with the Wisconsin and Superior Railroad Company, if the stockholders of both should so agree; and they were invited so to do upon the pledge by both States, that upon so doing all the rights, privileges and advantages specified in the charter of the latter Company,

should belong to and be enjoyed by the Company thus to be consolidated, *subject to the obligations contained in the charter of the Wisconsin and Superior Railroad Company, and in the aforesaid Act of Congress;* and such Company, when consolidated, was declared liable to pay all claims and demands existing against either Company, and was subject to prosecution for non-payment thereof. Upon these terms and conditions the stockholders of both corporations entered into the proposed agreement of consolidation, and perfected the same under the name of the Chicago, St. Paul and Fond du Lac Railroad Company, in accordance with the offers, requirements and pledges of this joint legislation; and having so done, the stockholders of both surrendered their stock and accepted in lieu thereof stock in the new Company, which thereupon proceeded to issue its bonds and to execute its mortgages upon the property of the consolidated Company; and thereafter, being unable to pay its obligations by further joint legislation of said States, the property of said Company was authorized to be sold as one road, and the purchasers were authorized to form a new corporation, with all the rights, advantages and obligations of either and all of the corporations which had been consolidated into the Chicago, St. Paul and Fond du Lac Company.

This was done, and a new corporation organized under the name of the Chicago and Northwestern Railway Company. Subsequently, and by the joint legislation of said two States of Wisconsin and Illinois, the Galena and Chicago Union Railroad Company, chartered by the latter State for the period of sixty years (with no authority of alteration or repeal reserved), was authorized to

consolidate by agreement with the Chicago and Northwestern Railway Company; and this was done, and the stockholders in the former amended their stock, and took stock in the Company as consolidated; and various debts due by the Galena and Chicago Union Railroad Company prior thereto, were assumed by the consolidated Company.

FOURTH.—On this state of facts, it is insisted that the contracts thus expressly authorized by this joint legislation, to be entered into between the stockholders of the several corporations for the consolidation thereof, cannot by either State be impaired. It is submitted that when the stockholders of the Illinois Company agreed, upon the invitation and pledged faith of the State of Wisconsin, to surrender their stock and property in the Illinois Corporation, and take stock therefor in the Company to be consolidated, they did so upon the agreement by the State of Wisconsin, that the franchises and privileges it had stipulated the consolidated Company should enjoy, should not be withdrawn from it. The obligation in favor of the United States was devolved upon and assumed by it; but this was agreed to be performed by the Illinois stockholders and corporations only upon the faith that the State of Wisconsin would not, by any Act in violation of its pledges, disable the consolidated Company from performing it. So too the stockholders of both agreed that the debts of each should be secured by mortgages upon the entire property of the consolidated Company; and consequently if by the Legislature of Wisconsin

its property in that State should be impaired in value or rendered worthless, as by the Act in question if enforced it will be, the burden of maintaining the road and of paying creditors and performing said obligations to the United States, will be cast upon the Illinois portion of the railway to the manifest injury of its former stockholders—one of whom is before the Court—who surrendered their stock upon the legislative pledge of Wisconsin that its stipulated franchises should be perpetual and remain substantially unaltered.

It is, therefore, submitted that the several corporators of Illinois who were invited to consolidate with the Wisconsin companies, and who did so in consideration of the promises of that State, are entitled to hold the stipulated privileges and franchises, and especially that the State cannot be allowed to fix rates of compensation in precise violation of its pledge, and thus disable the consolidated Company from performing its obligation to the United States. In the language of this Court in 8 Wheaton, page 89, "can the Government of Wisconsin fly from this agreement because it involves a principle which might be inconvenient to the State?" If it shall be suggested that possibly the Government may never require this, the answer is, so may the creditors of the Company never demand payment of their debts, or the employees of the Company payment for their services. But this in no sense meets the difficulty, for the corporation has a right to insist as against the State and all others, upon the performance of such stipulations and agreements as were made in consideration of the obligations by it assumed; and it certainly could not have been supposed by the Illinois corporations or stockholders when they

merged all their property in the consolidated Company, and undertook as an integral part thereof, among other things, to construct and forever maintain a railway for the carriage, without charge, of the troops and property of the United States, that the State of Wisconsin could in violation of its pledge, render the railway and property thereof utterly worthless, and thus cast the burden of performing this and other much more serious obligations, wholly upon property which had been surrendered as aforesaid by the Illinois corporations and their stockholders.

FIFTH.—It may also, I submit be maintained, that the Chicago & Northwestern Railway Company having derived its corporate existence by virtue of the joint legislation of two States, its charter became a compact between them, which neither could alter without the consent of the other. This proposition was laid down by this Court in Perrine *vs.* Chesapeake & Delaware Canal Company, 9th Howard, 183, and is as applicable to this case as to that, and indeed more so. The State of Illinois has no reserved authority to alter or repeal charters of corporations by it authorized to be consolidated, and when by this joint legislation it was declared that the consolidated corporation should enjoy all the privileges and franchises previously possessed by either company, a great wrong would be done to the Illinois corporations and stockholders by permitting the State of Wisconsin to repeal, or so alter chartered privileges of the corporation within that State, as seriously to impair the value of its property therein. If it be said the State reserved

power to alter its charter, the answer is that even if it *may* do this, it is not compelled to, and ought not so to do in violation of its promise, on the faith of which valuable rights were surrendered. And if under these circumstances a Court of justice has power to restrain so great a wrong, so palpable a departure from that uprightness which should distinguish States as well as individuals, it will not hesitate so to do.

SIXTH.—The agreement by which the Illinois stockholders consented to the consolidation of their Companies as before stated, constituted a contract between them and the Wisconsin Corporations, entered into in exact conformity with the laws of that State, which cannot be lawfully impaired.

1st.—The power of the State under the reservation in question, is in all cases limited to the alteration of the contract of Charter as between the State and the Corporation. This, and only this can the State reach. All contracts previously made by the corporation with third persons in pursuance of the charter are binding. This is well settled.

Bronson *vs.* Kinzie, 1st Howard, 311.
McCracken *vs.* Hayward, 2d Howard, 608.
Curran *vs.* Arkansas, 15 Howard, 305.
Hawthorn *vs.* Calef, 2 Wallace, 10.
Tomlinson *vs.* Jessup, 15 Wallace, 454.

Thus, if by its charter a corporation be authorized to issue bonds, and to mortgage its property and franchises to secure them, after this is done and the bonds sold, the State cannot under this

reservation impair the validity of the mortgages by enacting that the charter should be so altered as to forbid the execution by the Company of such securities It might deprive it of power to do so thereafter, but as was said in this Court by Chief-Justice Marshall in the case of Fletcher *vs* Peck: "If an Act be done under a law a succeeding legislature cannot undo it." So also if a corporation be expressly authorized to mortgage and convey to trustees as security its railway property and franchises, and all right to compensation for the use thereof, and a mortgage is made in precise conformity with such authority, a Statute which should attempt on pretext of altering the charter, to impair the validity or value of this security in the slightest degree, would be void as impairing the obligation of a contract.

2d.—It is very clear that the Act in question, if enforced, will impair the contracts entered into between the Illinois stockholders and the Wisconsin corporations, whereby the Chicago and Northwestern Railway Company was consolidated. These stockholders were invited and authorized by the State of Wisconsin to surrender their stock and the property it represented, and deliver them to the Company to be consolidated, upon the express agreement, which the corporations of Wisconsin were authorized to make, that the new corporation to be formed should forever thereafter possess all the rights, privileges and franchises then enjoyed by either corporation. At that time, by the express terms of each of the charters granted by both States, and by force of natural right the stockholders and directors had power to fix reasonable rates of compensation for service of their companies as common carriers.

Without ability so to do, the property of neither corporation could have had permanent value; and it is not pretended that the State of Illinois could alter or repeal either of the charters by it granted. The contract was made between stockholders of the Illinois Company and a corporation of Wisconsin, the charter of which expressly empowered it to fix such compensation; and that State expressly promised the Illinois stockholders that if they would agree to consolidate their stock and the property of their corporations with that of the corporation of Wisconsin, the Company thus formed should possess among others such right. The contract was made. It is not between the State and the corporation, but between the latter and stockholders of an Illinois corporation, in consideration of which valuable rights of property were surrendered. Can the State violate this, even on the assumption that under the reservation it might, as between it and the corporation, fix rates of compensation for its services as a common carrier? It is submitted it cannot.

It cannot of course be doubted that if the railways of the consolidated Company in Wisconsin be rendered unproductive, and therefore substantially valueless by the enforcement of the legislation in question, the stock by the Illinois stockholders, received in return for that surrendered, is impaired in value, and this because the consolidated corporation has not been permitted to enjoy in Wisconsin the same rights and privileges originally enjoyed by both or either of the corporations which were united to form it. Such impairment of value would be the direct consequence of the violation of the contract authorized by Wisconsin, by which the entire consolidated corpora-

tion was to possess all the rights, privileges and franchises possessed by either of its parts.

SEVENTH.—I now call attention to the contract entered into by express authority of the State of Wisconsin, between this corporation and its bondholders and trustees. These bonds were purchased upon the pledge of the States of Wisconsin and Illinois, that the corporation should have perpetual power, not only to operate the roads, but to fix rates of compensation at its discretion, subject, of course, to the common law rule to be judicially applied, that its charges as common carriers should be reasonable. They were negotiated and purchased upon the faith of the express provisions in the charters granted by these States, that the mortgage or deed of trust to secure their payment, authorized, according to its terms, the trustees or mortgagees to enter into the possession of the property of the railway company, and of all franchises and privileges conferred upon it, and to remain in such possession and operate the road, or to sell the railway property and all its franchises and privileges for the purpose of paying the bonds. The Statutes, the charters containing the stipulations of both these sovereign States, the purchasers had a right to rely upon for the performance of those conditions.

The bonds were sold largely to capitalists living abroad, at a time when railway securities were in favor, and with knowledge that, up to that period, no incident had occurred in the history of civilized nations where faith, thus pledged, had been violated; for so tenderly of corporate privi-

leges and property has the British Parliament ever been, that it is believed there are but two cases in which such privileges and property have ever been taken away or confiscated by legislative action. One was when the Order of Templars was suppressed in the time of Edward II., and the other when the religious houses were suppressed in the time of Henry VIII.

If purchasers had been told whilst negotiations were pending, that the State of Wisconsin could interpose at pleasure, and declare what compensation the Company should thereafter receive for the carriage of freight and passengers, no sale of the bonds could have been effected. Neither stockholders or bondholders would have advanced a dollar, in view of such a contingency. Nor will capitalists in this country or abroad ever again advance to our citizens moneys in aid of the construction of railways, until the questions here raised have been settled in favor of the complainants; so that unless the amount to be seized and confiscated by those who incite the legislative action in question, is so great that the State is willing for the prize to surrender all hopes of attracting more capital within its limits, it hardly seems expedient to make the effort, to say nothing of its injustice. Should it be successful, it will be fraught with misfortune to the State achieving it, and in its consequences tarnish the reputation—not of that State only, but of others.

It cannot, I think, be questioned, that the contracts under which the trustees and bondholders claim, were made by express authority of the State between the corporation and third persons, and belong to the class of contracts which cannot lawfully be impaired by State legislation.

In view of the proposition I am presenting, it might be conceded that the Legislature of Wisconsin could lawfully repeal, or in any respect alter the charter of the Chicago and Northwestern Railway Company, and thus utterly annihilate or materially change its provisions and the rights of the corporation thereunder. It might be admitted that the corporation could be prohibited from hereafter so mortgaging its property as to vest in trustees any right, except to sell its real and personal estate. Such an instrument would be of comparatively little value as a security to bondholders; for a sale of railway property, no matter how extensive or valuable for railway purposes, would bring but a trifling sum, unless the purchaser could take with it and enjoy the franchise of operating the road. So, too, it may be conceded that the State might so alter a charter as to permit a mortgage upon the entire property and franchises of the Corporation, excepting only that authorizing it to fix its rates of compensation for the carriage of freight and passengers; but who can doubt that if this right were in express terms reserved to the State, the mortgage would be regarded as substantially worthless as a security? Nevertheless there would in such case be no fraud or deception practiced upon those who should purchase bonds thus secured. Let us assume, then, that this crippling process of State legislation, may as between it and corporations, be applied to existing charters, and the inquiry presents itself, can the obligation of prior contracts entered into between such corporations with third persons, in precise conformity with the terms of their charter, be impaired by such subsequent legislation? To illustrate, sup-

pose the State of Wisconsin had, by the Statute of 1874, enacted that no part of the road-bed or real estate of the Chicago & Northwestern Railroad Company should be conveyed or sold by the trustees under the trust deeds in the bill mentioned, would not such a Statute be utterly void as to the complainants? Suppose also, the State to have prohibited the use or sale by the trustees of any of the franchises or privileges to them mortgaged, but that these should revert to the State whenever such default should be made in the payment of the bonds or interest, as by the terms of the deeds entitle the trustees to enter into possession of and use or sell the railway and property mortgaged. Would not such an Act clearly and fatally impair the obligation of the contract? But suppose, again, that the State should prohibit to the corporation the exercise of the right expressly granted to it, of fixing its rates of compensation for the carriage of freight and passengers, and should also prohibit the use by the trustees or purchasers of the property and franchises thus mortgaged, except upon condition that the State should thereafter fix such rates, would not such a prohibition and condition, so clog and encumber the property mortgaged as to render it substantially worthless, and thus seriously impair the obligation of the contract—not between the State and the corporation, but between the latter and third parties?

It is no answer to this to suggest that the Legislature having reserved power to alter the charter at pleasure, all persons dealing with the Company are bound to take notice of this, and to contract at the risk of having their contracts with

the corporation impaired and rendered utterly worthless. If such a rule were adopted, corporations subject to such reserved authority would be entirely unable to induce persons to contract with them, for if the latter were bound to imagine, before so doing, that all remedy against them upon contracts might at any moment be cut off by State legislation, no credit whatever would be extended to them. To illustrate, suppose the bondholders who bought upon the faith of the provisions of the charter in question, had, before purchasing, been advised that the State of Wisconsin could at any time thereafter, deprive not only the Company but the mortgagees and purchasers, of the power of fixing rates of compensation for the carriage of freight and passengers, can it be supposed that a dollar would have been invested in the bonds which have been, here and abroad, so freely taken by purchasers?

The law of the land—based upon the eternal principles of justice, has, however, adopted a rule of protection which stamps such legislation as utterly void. It proceeds upon the theory that whatever contracts a State has in terms or by fair construction of charters authorized corporations to make with third persons, shall, when so made, be protected from any impairment whatever by State legislation. It does not give force to the suggestion that persons contracting with corporations, must at their peril, take notice that the State having reserved power to repeal, alter or amend their charters, may do so even to the destruction of the rights of persons previously dealing with them. It does not permit the State, where a corporation has in pursuance of its charter

mortgaged its property and franchises to secure bonds payable at the expiration of a year, to say to the mortgagees, "you may take, use and sell this property and these franchises in execution of your trust," and to another mortgagee of the same property and franchises under a mortgage to secure bonds payable at the expiration of two years, "you shall not avail of the property for this purpose, because under a reserved power, authority to mortgage such franchises and property, or either has been since the first mortgage became due, withdrawn from the corporation by an alteration of its charter," The law, the Constitution of the United States, forbids this, and declares that all contracts made with a corporation in accordance with the provisions of its charter shall be held inviolate, and enforced without the least impairment by means of State legislation; and this just and benign principle has been often applied and enforced by the Supreme Court of the United States.

Bronson *vs.* Kinsie, 1 Howard, 311.
McCracken *vs.* Hayward, 2d Howard, 608.
Curran *vs.* Arkansas, 15 Howard, 305.
Hawthorne *vs.* Calef, 2 Wallace, 10.
Tomlinson *vs.* Jessup, 15 Wallace, 454.
Woodruff *vs.* Trapnal, 10 Howard, 190.
Curran *vs.* the State of Arkansas, 15 do, 304.

It has been urged that parties dealing with Corporations are bound to take notice of this reserved authority to alter Charters, and to contract with a view to its possible exercise by the State. To this it might be answered that no such reservation was contained in the Charter of the Chicago and Northwestern Railway Company; but on the con-

trary, by its express terms, every franchise granted was declared to be perpetual; and one of its stipulations was, that rates of compensation should be fixed by the Corporation. This Charter was exhibited to foreigners, and others not citizens of the State of Wisconsin, who, on the faith of its provisions, were invited to, and did, purchase bonds to the extent of many millions, entirely ignorant, in fact as well as in law, of this reservation; for it is well settled that only citizens of, or persons resident within, a State, are presumed to know its laws, or bound to take notice of them.

But suppose this were otherwise, of what were persons, about to purchase these bonds, to take notice? The Charter was plain and complete, and all they could know was, that the Legislature of Wisconsin might possibly alter it, but in what respect they could neither know nor guess. Still more ample franchises might be granted, or those given—one or more, curtailed; but whether so as to impair the value of the security offered, it was impossible for purchasers to imagine. Were they to assume that the State, in violation of right and of all precedent, would prohibit the Corporation from receiving more than sufficient compensation to pay operating expenses and taxes? Were they to imagine that possibly the State might, on the theory that the right to take compensation for services is a franchise, to be at pleasure withdrawn, take absolute control of, and confiscate it for the uses of the State or its people? Assumptions such as these would have prevented the sale of a single bond in any market; and to hold, on this theory of notice, that these should have been indulged in, would be a disgrace to any Court of justice.

In nearly, if not quite every case where this Court has held that contracts, entered into in pursuance of existing laws, cannot be impaired by subsequent State legislation, the parties contracting have had notice of its power to alter them, whether in the form of corporate charters or otherwise,—the well-established rule being, that laws subsisting at the time and place of making the contract enter into and form part of it, as if they were expressly referred to, or incorporated into its terms.

Von Hoffman *vs.* City of Quincy, 4 Wall., 550.

Thus, in that case, the law of Illinois authorized the city to levy taxes sufficient to pay the interest on bonds issued and sold at the time such law was in force; doubtless on the faith entertained by the purchasers that it would so continue as security. They had notice, however, that the State was under no obligation of contract with the city not to alter or repeal such law, but that this might be done at pleasure. The law was afterwards so altered or repealed as to prohibit the city from levying taxes sufficient to pay the interest on the bonds sold; but this Court held, notwithstanding, that as the law entered into and formed part of the contract between the City of Quincy and purchasers of bonds, it could not be altered by the State to their prejudice, but must be enforced for their benefit as if unrepealed.

So too in the case of Bronson *vs.* Kinsie, 1 Howard, 297, this Court held that where a mortgage executed upon real estate in Illinois contained a power of sale, that the right of the mortgagee to sell the property for the most it would bring, was

Has the Legislature the Constitutional power to alter or repeal the franchises owned by the Central Pacific Railroad Company, by which the State authorized it to collect tolls within certain limits?

OPINION

BY

JOHN B. FELTON.

SAN FRANCISCO:
H. S. CROCKER & CO., PRINTERS AND STATIONERS,
1875.

To Hon. LELAND STANFORD:

You have requested me to give you my opinion on the question whether the Legislature of the State of California has the right, arbitrarily, to change the freights and fares of the Central Pacific Railroad, under the Constitution of that State. In reply, I submit to you the following opinion:

The power to change the freights and fares is supposed to be found in Section 31, Article IV., of the Constitution of the State of California: "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All general laws and special acts, passed pursuant to this section, may be altered from time to time or repealed." It will be seen that this section of the Constitution applies to all corporations, whether strictly private in their nature or quasi public. And by Section 33 of Article IV., of the Constitution, corporations are defined as follows: "The term corporation, as used in this article, shall be construed to include all associations and joint stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships." Under these provisions of the Constitution, it is contended that the law by which the Legislature granted to the railroad company the right to collect tolls and freights within certain limits, can be repealed or

altered at the will of the Legislature; that this provision entered into and became a part of the contract between the Legislature and the railroad, and that the railroad accepted this condition, and is consequently bound by it.

If it is true that the repeal of the law, under which corporations are formed, completely sweeps away whatever rights, property and privileges, the corporation had acquired prior to the repeal of the law creating it, then the Legislature would have an unlimited right, arbitrarily, to destroy a great part of the property of the country. It could confiscate the property of churches, deprive charitable societies of the donations of the benevolent, seize upon all the moneys of the savings banks, and appropriate to whatever uses it chooses the proceeds of the mines. If corporations have consented that the Legislature may alter at will their charters, what would prevent it from enacting a law that every mining corporation shall be transformed into a benevolent association and be compelled to pay all its proceeds in charity, or that a water company should give all its water gratuitously, or that a corporation organized as a religious corporation should confine itself to banking business? Under this construction, if three men own a mine and deed that mine to a corporation, the property which in their hands was protected by all the power of the State and Federal Constitutions, becomes subject to the caprice of the Legislature. Translated into plain language this clause of the Constitution would read thus: "Whenever, for the more convenient mode of do-

ing business, any men unite themselves into a corporation or joint-stock company, they place in the power of the Legislature of the State all of their property rights, and permit the Legislature to change the nature and tenure of these rights or to abolish them altogether at its will; they allow the Legislature to change contracts already made or to take from them all their obligatory force, or to make any new contracts in their name which it chooses. The creditors of the corporation have trusted it knowing that this provision was a part of their charter and consequently consent that all of their debts may be reduced or abolished at will. The corporators, who, by law, are responsible for their proportion of the debts and liabilities of the corporation, consent that the Legislature may take away all the money which they may have invested in such corporation and leave them, thus stripped, only the privilege of being responsible for the debts and liabilities.

These are some of the consequences which would arise if the doctrine is true that this clause of the Constitution, to use the language of Senator Carpenter, makes "railroad companies the mere creatures of law, drawing their breath of life from the law alone, capable of doing only what the law permits them to do, and holding their lives and powers at the mere will and pleasure of the Legislature." People in their attacks upon railroad companies have overlooked the fact that the Constitution has made no difference between these corporations and any other kind of corporation, and that there is not a pri-

vate corporation, formed for private business purposes, that is not on this construction left absolutely at the mercy of the Legislature.

I shall argue three propositions which seem to me decisive of this case.

First.—That the right of the Legislature to alter or repeal the law creating a corporation does not imply any right to take away or change any property right, acquired by the corporation while the law authorizing it to acquire such property was in force unaltered and unrepealed.

Second.—That the right granted by the Legislature to charge certain tolls during the continuance of its charter, is no portion of the charter itself, but is a property, a franchise, an incorporeal hereditament, which is just as much the property of the corporation as its cars, or rails, or houses.

Third.—That property, although nominally in a corporation, really belongs to the men who form the corporation; that a corporation, though in one sense an individual born of the law, is, in a wider sense, but a mode adopted for convenience, by which men acquire and manage property, and that the property thus acquired and really belonging to private individuals is as much protected by the Constitution as though it still remained in the name of the individual.

The first proposition then, is, that the right of the Legislature to alter or repeal the law creating a corporation does not imply any right to take away or change any property right, acquired by the

corporation while the law authorizing it to acquire such property was in force, unaltered and unrepealed. It would seem too clear to need argument, that the right to alter or repeal a law does not involve the right to alter or repeal rights which have vested while the law was in full force. Every power of attorney, not coupled with an interest, is repealable and alterable at the will of the party granting the power ; but it was never contended that the revocation of a power of attorney could disturb or affect either property or contracts made before the revocation. So, in this case, the Legislature has granted to the corporation certain powers, and among others, the power to acquire franchises, real estate, and to contract debts. During the existence of this power the corporation has acquired certain franchises and other kinds of property. One of these franchises the State itself has granted ; other franchises it has acquired by foreclosure under the laws of the State, or by voluntary sale to it. The other property it has acquired by private donations, by public subsidies, by purchase. Its stockholders have put in their own money, which is represented by the property thus acquired.

Now, it is evident that there is a distinction between the power to acquire property and the property itself, when acquired ; and that the Legislature, when it grants a franchise, occupies a different position from what it does when it grants a power to acquire a franchise. In the one case it is creating corporate powers. In the other case it is granting a property right, which does not necessarily imply any corporate power

whatever. The Legislature can grant a franchise to an individual as well as to a corporation. Suppose the Legislature, instead of granting to this corporation the right to collect tolls within certain limits, had granted the right to four individuals:—In this case no one would contend that the Legislature could, by destroying this limit, destroy the franchise; for, in this case, the contract would be made directly with the person, and there is no pretence that the Legislature can revoke a grant which it has once made to the individual. Suppose again, that the Legislature, having thus made an irrevocable grant of a franchise to an individual, that individual should assign it to a corporation, would that franchise become revocable or changeable in the hands of the corporation? Certainly, this franchise so in the hands of the corporation would be no portion of the charter of the corporation. It would not be created by the law creating the corporation. Why then should the alteration or repeal of the charter of the corporation, which had nothing to do with the creation of the franchise, affect the franchise? In this case, the franchise would have passed irrevocably out of the power of the Legislature by a law which could not be changed—which was executed, and had created a vested right. If this reasoning be correct, then a corporation can acquire a franchise, originally granted to an individual, which will not be affected by a change or repeal of the law creating the corporation—a franchise which would survive even the dissolution of the corporation. But how absurd it would be to draw a distinction between the right of the Legis-

lature to regulate freights and fares in the case where the State originally granted the franchise to the corporation, and such right of the Legislature in a case where the corporation purchased the franchise from the individual to whom the Legislature originally granted it.

Or again, let us make another supposition. Suppose, under the foreclosure of a mortgage of a franchise (which the Legislature gives the corporation power to make) an individual should purchase it. Now, this individual, holding the franchise by virtue of a sale authorized by the Legislature, does not become a corporation—he has simply acquired property in his individual capacity; he has no charter—no corporate powers—now would it be seriously contended that a repeal of the charter of the corporation would repeal the property rights of the individual acquired under the sale? Or if the Legislature passed a law changing the right of the corporation to charge tolls, would this change in the power of the corporation change the property in the hands of the individual, when the corporation itself has lost all power over it?

But let us take another case, which is not an imaginary one. Let us suppose a corporation has had granted to it, in its original charter, a franchise such as the franchise granted to this corporation. Under the power given to it in its charter, it mortgages its franchise which mortgage is subsequently foreclosed, and the franchise sold to an individual. After thus losing its original franchise, the corporation purchases another franchise, which was originally granted to an individ-

ual and is by consequence unchangeable by the Legislature. Now we have this state of the case—the corporation has parted with, to an individual, its original franchise; but it has acquired another, which was granted to an individual. In this state of the case, the Legislature changes the original law creating the corporation. Which franchise is affected by this change? Is it the franchise which the corporation has parted with, or the franchise which it has purchased, which the Legislature has no power over? We have thus supposed the case of a corporation acquiring its franchise from an individual to whom it had been granted, and also the case of a corporation parting with its franchise to an individual. In both of these cases it is clear that the charter rights of the corporation have remained unchanged—they have not been increased in the first case nor diminished in the second. Hence, it follows, that the franchise itself was no part of its charter. It was simply a property acquired by virtue of its charter. And hence, it follows, that a change of the charter would no more affect the franchise than it would affect a house or a rail or a car belonging to the corporation.

But it is said that this clause of the Constitution, giving the right to the Legislature to alter or repeal any law creating a corporation, is a condition attaching to the franchise itself, and as such would affect the rights of any purchaser of the franchise. In other words, it is urged that the purchaser could acquire no greater rights than the corporation itself. This argument has been very much urged by public speakers who, we

imagine, hardly saw the consequences of the doctrine. If this clause of the Constitution becomes a condition in every transfer of corporate property, then a real estate corporation can not sell a piece of real estate to an individual in such a manner that the Legislature can not take it away from him. It is well-known that this very corporation, the Central Pacific Railroad, has received immense grants of land from the United States and has sold them to settlers. If it is true that their road holds its property subject to the right of the Legislature to take that property away, and that this right of the Legislature is a constitutional condition which follows the property into the hands of the purchasers, then we have these thousands of settlers owning land which the Legislature may divest them of without compensation. Then we have the consequence that, whoever derives his property from any corporation holds it with the condition that the Legislature may deprive him of it at will.

But let us examine a little more closely this language of the Constitution, and see, if we can, what it really does mean. The language is, "corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All general laws and special acts passed, pursuant to this section, may be altered from time to time or repealed." Here seems to be a prohibition against granting special charters. The law creating corporations must be general. But how far must it be general? Does this clause mean that there must be but one law for all corporations? Evidently not;

for as there are various corporations differing entirely in their nature, in their business purposes, in their formation, there must evidently be various laws conferring different powers, privileges and constitutions on different corporations. It would be absurd to make the same laws for the creation of college or university corporations as are made for railroad purposes or insurance companies. The general law here spoken of is a law which is the same for the same classes of corporations. Now this law may be altered or repealed — this law which enables corporations to be formed or created. But there is nothing in the Constitution which says that when a law authorizing the creation of a class of corporations is repealed, that such repeal shall have a retroactive effect and destroy corporations which have been already formed or created.

The Civil Code of California, passed in 1872 (Sec. 288), changes the law in regard to corporations, but it provides that corporations formed prior to the passage of the Code shall not be effected thereby. The Code consequently divides railroad corporations into two classes, the one formed before the Code, the other after. If now the Constitution intends that in all cases the general law shall apply to all corporations of the same class — for instance, if it means that all railroad corporations shall be subject to the same general law — then the Code itself would be unconstitutional. For it makes one law for railroad corporations created before the Code, and another law for corporations created after the Code. But if we suppose that the Constitution simply means

that the general law creating corporations might be changed so as to have simply an effect on future corporations but no effect on corporations already formed, then we give a construction to the Constitution consistent with right, justice and the natural import of its words. The Constitution would then read that corporations might be created under general laws, but the general laws might be changed so as to operate on the creation of corporations thereafter to be formed. And this is precisely what the Code of California has undertaken to do. It has left the old law in force as to corporations already existing, and has made a new law applicable to new corporations. This construction evidently would be a just one, would preserve vested rights at the same time that it would enable the Legislature to correct mistakes in the future.

But it may be said in answer to this, that such a construction renders the words of the Constitution useless, since without any such provision a general law could be repealed or modified; and again it may be urged that a corporation has no powers save such as are conferred by the organic law, and that a repeal of that law destroys absolutely all the powers originally conferred upon it. To the first objection we answer, that these words have a meaning on this construction, if we take them in connection with the first provision of this section. The provision is "all corporations shall be formed under general laws." Now, if this provision stopped there, it might well be doubted whether when a general law was once passed as to all corporations, a new general law

could be passed as to future corporations; whether all corporations would not, of necessity, have to be formed under the same general law. To remove this doubt, the Constitution wisely provides that one general law may be made for corporations, and if that law does not work well, the old law may be repealed or altered so as to affect future corporations.

To the second objection, that a corporation has no powers save such as are conferred by the organic law, and that a repeal of that law destroys absolutely all the powers originally conferred upon it, I answer that we must not confound the law itself with what has been done under it. According to the Dartmouth College Case the charter conferred by this law was a contract between the Legislature and the corporation. It was only the law under which this contract was made that could be repealed or modified, not the contract itself; and it is a familiar principle of law that the repeal of a law under which a contract has been made does not change or affect the contract itself. Taking all the provisions of the laws and Constitution together, and they amount to this: The Legislature passes a law offering to all corporations certain privileges, powers and franchises. The corporation comes in, assents to the conditions, and accepts the privileges, powers and franchises. There is full consideration on both sides. On the one side, the corporation builds a railroad of immense benefit to the State—on the other the Legislature grants franchises and privileges. The contract is perfect and entire.

The Constitution says this law can be repealed: Grant it; but before it is repealed or modified, the contract is made. Now will it be pretended that the contract is destroyed simply because the law under which it was made has been repealed after it was made. Suppose the Legislature should offer a reward of five thousand dollars to every man who should apprehend a murderer, and while the law was in force, at the risk of my life, I arrested one. Here the contract is complete, and I am entitled to my money. Now suppose after I had rendered the service, the law was repealed, would such repeal extinguish the obligation, contracted while the law was in full force and vigor? All laws authorizing contracts to be made are repealable or modifiable—but does it follow that the contracts made under them are repealable or alterable? The law establishing San Francisco as a corporation can be repealed or modified. But suppose that San Francisco should, while incorporated, grant the franchise of a street railroad to an individual, would the repeal of the city incorporation take away the franchise? San Francisco has the right, under a law, repealable or alterable, at the will of the Legislature, to issue bonds, make contracts, sell lands, grant wharf franchises. railroad franchises. Will it be pretended that all these bonds, contracts, sales of lands, grants, wharf franchises, railroad franchises, are all wiped out by the repeal of its charter and its utter destruction as a corporation? In other words, we have a law called the corporation law. The Legislature, under that law, makes certain contracts with corporations, by which it covenants

that they shall have a corporate existence and certain privileges, powers and franchises. Exercising its constitutional right, the Legislature repeals or alters the law under which it made such contracts. How can it be that this subsequent repeal affects these contracts, which were made while the law authorized them to be made? You might as well say that the death of an individual destroys all the contracts which he made in his life time. Paralysis may change his contracting power or death may repeal it—but what he did before paralysis or death, remains. Every one is liable to have his faculty of contracting repealed or altered—but that does not affect his contracts made while his faculties retained their vigor.

I contend, then, first, that the fair and just construction of the constitutional provision, giving the Legislature the right to alter or repeal laws forming corporations, is, that general laws may be changed so as to admit of new corporations, with new powers—that these words are prospective, and not retroactive; and I contend, second, that the charter of a corporation is a contract; and that if such charter is granted by a law authorizing such grant, the alteration or repeal of the law under which the contract was made does not alter or repeal that contract.

Or put the case this way: Is a charter, granted by a Legislature to a corporation, a contract with that corporation? The Dartmouth college case says that it is. Did the Legislature, in this case, have power to make this contract? No one disputes it. Does the subsequent repeal or change of the law, under which this contract was made, affect

the contract? Evidently not. Is it not an incident to every law, under which a contract is made, that the law may be changed or repealed? Evidently it is. If so, would not every contract, made under a law which can be altered or repealed, be alterable or repealable when the law is so—would this not be a condition entering into every contract? The supposition is absurd. It would destroy all contracts—all property.

But it is said that the law authorizing corporations, *created* the corporation, and that when this law is repealed, the very creation of the corporation is destroyed. But the evident answer to this proposition is, that the law did not create the corporation. The law might exist fifty years, and yet give birth to no corporation. The corporation is formed by the acceptance by the corporators of the offer made to them by the Legislature. The law says, I will give to such men as choose to avail themselves of my offer certain privileges, rights and powers, on certain onerous conditions. The individuals accept the offer of the Legislature, and bind themselves to fulfil the conditions. Now, this is plainly a contract made between the Legislature and certain natural individuals, who become corporators. The contract is evidently not made in the first instance with the corporation, for that is not in existence. The incorporation is but the evidence of the acceptance, by the individuals, of the terms offered by the Legislature. We have then a contract made between the Legislature and natural individuals; and this contract, when made, is evidently no part of the law, any more than a contract made by virtue of a

power of attorney is a part of the power of attorney. The repeal of the law would no more destroy the contract, made between the Legislature and the corporators, than would the revocation of a power of attorney destroy a promissory note made under it before its revocation. The contract is an agreement between two parties. The law is but the power belonging to one of them. The truth is, that the corporation survives the repeal of the law, which originally created it, by force of the contract. It lives because the Legislature and the corporators agreed that it should. And if the agreement was valid at the time it was made, the repeal of the power under which it was made cannot change its terms. The right to repeal or change a power is no portion of the contract made under that power. The right of the Legislature to withdraw an offer to allow incorporations, does not affect the obligation arising from an acceptance of that offer before it is withdrawn.

But it is said that the same clause of the Constitution authorizes the Legislature to change or repeal the special acts under which municipal corporations are formed or created, and that such a repeal would undoubtedly destroy the municipal corporation so created. Why then it is asked, if the repeal of the act creating a municipal corporation destroys the corporation, would not the repeal of the general law creating private corporations destroy those private corporations? The distinction already laid down fully answers this question. A municipal corporation is but a part of the government of the State. It is a depart-

ment of the State rather than a separate entity. The State does not contract with it—it erects it; it creates it. It is the agent of the State by which the State governs distinct localities according to the necessities which a distinct locality makes. The special act, therefore, by which a municipal corporation is created, is not a contract between the State and the corporation nor between the State and the incorporators of the municipal corporation. But while this is true of the municipal corporation as such, it nevertheless is true that the State can contract with this municipal corporation, and in such a case such contract cannot be repealed by the State or modified by it. This point was directly decided by Justice Field, of the Supreme Court of the United States, while Judge of the Supreme Court of the State of California, in the case of Grogan Lent v. the City of San Francisco. In that case the facts were, that the State of California had granted to the City of San Francisco certain water lots on certain conditions. Afterwards, the Legislature attempted to change these conditions; and it was held that the State had no right so to do. It has been repeatedly held in California, that the Legislature could not repeal the charter of a municipal corporation so as to destroy its debts contracted before the repeal; and, I imagine it would not be contended, if the State should borrow the money of the City of San Francisco and issue its bonds therefor to the city, that the State would have any right to annul the contract so entered into between it and its creature. Let us analyze a little further this language of the Constitution, to see what idea was influenc-

ing its framers. It says all corporations shall be formed under general laws. Special corporations shall only be formed for municipal purposes. Here the idea in the minds of the framers is manifestly shown by the use of the word "general" as contrasted with the word "special," viz.: general laws for corporations not municipal. Evidently it was because the framers of the Constitution did not wish privileges given to one class of persons which were denied to others. In other words, the Constitution was opposed to monopolies. It did not choose to single out a few persons and say, I will give you the exclusive right to run a railroad between this point and that point; but it said to all the citizens, you, all of you, shall have the same right to run a railroad. I will make no distinction between persons; I will grant no right which all of you cannot have. I will make no special act. But having got thus far, the framers of the Constitution said: Now this provision, if acted upon and availed of by certain persons, may commit the State to an unchangeable policy. Future corporators may say: Inasmuch as you have granted these rights to corporations then in existence, you cannot pass a new law or change the old without making an invidious distinction. You will, if you are permitted to change the law, grant to one railroad corporation certain privileges which you deny to another. Such a law would not be a general law. The Constitution therefore wisely says: This idea of a general law must not be carried so far as to deny the power of substituting a new general law for a former one. The fact that rights have been acquired under one general law must not

prevent a change of policy, so as to enable us to subject future corporations to different restrictions. The idea, then, of the Constitution, in brief, is this: All must have the same rights. There must be no monopoly. But the fact that one set of rights has been acquired under one general law must not prevent the passage of a new general law granting entirely new rights to new corporations. But there is not one word in this provision which, by the most distant implication, prevents a general law, while in existence, from conferring the same rights which a special law would have conferred before the existence of this provision.

I have thus attempted to show that this provision of the Constitution, allowing the Legislature to change or repeal the laws under which corporations are created, is no part of the contract made between the State and the incorporators—that this provision does not enter into the contract as a condition thereof—that it does not diminish or affect the powers of the Legislature, while the law is unrepealed and unaltered. I have urged that the offer made by the law to incorporators, and the acceptance of such offer by them, constitute a contract; and that the contract, when made, is no part of the law, but an execution of the powers contained in the law; and that when this contract is complete, it is unaffected by the repeal or alteration of the law under which it is made.

Let us now admit, for the sake of the argument, that this provision of the Constitution for the alteration or repeal of the law under which a corporation is created does go to the full extent of destroying the corporation. Still the consequence would by

no means follow that the Legislature would have the right to change the freights and fares. On the contrary, it is clear that even on this hypothesis, no such power exists. In discussing this point I assume, what I shall hereafter show, that this right to collect tolls within certain limits is property—is an incorporeal hereditament granted to the corporation by the Legislature or purchased by the corporation from some individual or corporation who derived it from a grant, of the Legislature. Now, admitting that the Legislature has the right to alter or take away the powers of a corporation as such, it has no right to change or repeal its property rights. The distinction which I make is between the chartered rights of the incorporation which come from the law creating it and the property rights which are acquired as a natural person acquires rights. In the case of a natural person the same distinction exists. He has certain powers and faculties which he derives from nature and these powers and faculties may be changed or repealed either by nature or law. But his property rights neither nature nor the law takes away. Thus a man may lose his senses, be paralyzed or die—that is, his faculties or powers may be altered or destroyed—but in both of these cases his rights of property are unaffected. The law may deprive an infant or married woman of all faculty of disposing of or using property; but this only affects the person and not the property. The property still remains, and when it comes into the hands of a person whose faculties are unimpaired, can be used or abused, at the will of the owner.

So admit that the Legislature can impair or even destroy the faculty of a corporation for using property, the property exists separate from and independent of the power of the individual to use it. Thus if a corporation owned a lease or a house or land or cars, the entire destruction of the corporate entity would still leave this property in full existence, and the power of the Legislature to destroy the powers of the individual entity would no more imply the power to change the lease or the house or the land, any more than the right to put a man to death would necessarily imply the right to change or destroy any property which he might leave. If this corporation were destroyed, it is evident that all of the depots, houses, rails, cars, real estate and other property would remain—belonging to somebody and the property of some one. In other words, the death of the person is not the death of the property.

Now, if this franchise is an incorporeal inhereditament, granted to or purchased by the corporation, it is the property of the corporation and survives its dissolution—just as much as the other property of the corporation, real or personal, survives after the corporation is destroyed. It survives the corporation just as much as if the same franchise were granted to an individual and the individual should die—the franchise would survive to his heirs. Now, unless the State, on the dissolution of a corporation, succeeds to all its property, it would have no right to change the tenure or conditions of any property which the corporation might have, any more than it

would have the same right on the death of the individual. The question, who succeeds to the property of a corporation, we will discuss hereafter. It is sufficient for our present purposes that the State could not become the owner thereof, at all events, until after the destruction of the corporation and then only as its successor; that is, in that case, the property would not be destroyed by the destruction of the corporation. The right, then, of the State to destroy an individual, whether that individual be a natural or artificial person, does not carry with it the right to either appropriate to itself, or to change, or to destroy the property of that individual; nor does it carry with it the right, during the existence of that person, in any way, to change or to take away his property rights.

On the hypothesis then that the Constitution gives the Legislature the right at any time to change or repeal the charter of the corporation, what right does such a provision give to the Legislature over the property of the corporation?

First, what right does it give during the lifetime of the corporation? At this time it is clear that the State is not the owner of the property and consequently has no right as such owner. If it has any right at all it is by virtue of some right which it must have over the corporation in its legislative capacity, and not as proprietor. Where shall we look for this right? The property of the corporation is private property, and as such is protected by the Constitution under the provision that private property shall not be taken for public purposes except on full compensation. Though the Constitution

does not in words say private property shall not be taken for private purposes, still the whole tenor and spirit of the Constitution are to that effect, and it would be clearly unconstitutional for the Legislature to take any private property for private uses. It would evidently be just as abhorrent to the Constitution to take a mine or a deposit in a bank, or a piece of land from a corporation as it would be from an individual, and the one is as much within the protection of the Constitution as the other. The proposition, I think, may be laid down as one not to be disputed, that the private property of a corporation can no more be taken from it than the private property of an individual. It would be just as abhorrent to the sense of justice, to the spirit of the Constitution, to the protection of society, to rob the bank of three persons who happen to have incorporated themselves, as the bank of three individuals who have not.

Here there are two propositions. 1st: The private property of a corporation is under the protection of the Constitution. 2d: The faculties or powers of a corporation may be arbitrarily taken away; or, putting the same proposition another way, it becomes: 1st. The property of the individual is inviolate. 2d. The individual itself may be destroyed by law.

Now, if it is true that the Legislature cannot arbitrarily take away the property of the corporation, can it change its nature, so that it ceases to be the same property. Evidently not. The law which protects property protects the whole of it. If I make a lease for one hun-

dred dollars a month, it would be to take away my property to reduce my rent one dollar. If I have an incorporeal hereditament which gives me five cents toll on all passengers on a certain railroad for twenty years, you take away my property if you diminish the tolls by a mill. I have the right to the whole of it. And, if it is true that the right, which this corporation has, to collect tolls is a franchise, however acquired, whether directly from the State or mediately from a sale; if it is true that this franchise is property, and not a simple power without any interest, then it follows that the Legislature has no more power to take it from the corporation or to diminish any one of the rights contained in it, then it has to diminish a lease of a banking coporation or to take away the profits of a money corporation.

On this branch of the case I have conceded, for the sake of the argument, that the meaning of the constitutional provision, now under consideration, was to enable the Legislature to take away corporate rights, which it had already granted. But I have contended that the corporate rights were one thing and the property of the corporation an entirely distinct thing. I have urged that the property of a corporation is private property protected by the Constitution of the State of California, as well as by the Constitution of the United States.

The next proposition is, that the right to collect tolls is property—that it is no more a charter right of a corporation than is the real estate or

personal property of the corporation. But that it can be separated from or added to the corporation without, in any way, diminishing or increasing the charter or corporate rights of the corporation.

The corporation, which you represent, has several franchises which it has acquired, some by purchase, some by direct grant from the State. It is evident that when you purchased one of these franchises, you did not thereby acquire any increase of your corporate rights. You simply exercised one of those rights which permitted you to acquire these franchises by purchase, and this was no more the acquisition of a new corporate right than would be the purchase by you of a lease, or a piece of land, or any other property. So, when the individual or corporation sold to you the franchise, such individual or corporation did not alienate any corporate rights. It simply sold a piece of property. The franchises thus purchased by you consist of the right to collect tolls to a fixed amount ; that is, the limit beyond which you cannot go, is fixed. It is property granted you by the State, and carved out of the right of the State to collect tolls. In other words, the State says to you, I grant to you a certain portion of my own right to collect tolls. The State has recognized this grant as property with all the incidents of property. It has said to you, you can mortgage it to secure your debts. That is, you can give to a creditor the right to sell it at public auction to the highest bidder, whether such bidder be a corporation or not ; thus allowing this property

to pass away from the corporation into the hands of individuals who buy it as they would any other piece of property. In this right which you have of alienation, the State recognizes that it may be taken from you without changing or impairing your rights as a corporator. The State also authorizes the Sheriff to sell it for your debts, and thus allows any individual without any corporate rights to acquire it. An Assignee in bankruptcy can take it, and the Supreme Court of the United States has by its rules provided how the assignee can sell this franchise.

The franchise, as originally granted you, was useless without the employment of immense capital. It was a naked right to collect tolls; and before this right could be made available, it had to be clothed with rails and excavations through mountains, with costly tunnels, with huge buildings and depots; and all this labor and all this property are so bound up with the franchise, that if you destroy the franchise, this vast property becomes useless. The rails, the cars, the depots, the tunnels and excavations, become so many dead limbs and carcasses if you take from them the vital principle, the franchise itself. All this vast property, which is thus connected with the franchise so intimately that it perishes if the franchise is destroyed, as the body rots when life is taken from it, was acquired by the corporation from sources outside of the State. The European capitalists contributed vast sums. The United States pledged its credit for an immense amount. Towns and cities taxed themselves to aid you. And all this money was furnished on the strength

of the existence, in your hands, of this very franchise as a property belonging to you, and which could be used as a fund out of which your debts could be paid. This franchise, then, is not merely a property granted you by the State, but it is a property which you have augmented and improved to such an extent that it is no longer what the State granted you. It is now a vast property, made up of numberless component parts, to which the State has contributed but little, in proportion to what others have done.

The proposition that the State has the right to diminish at will this franchise. thus changed and improved at the cost of millions of dollars not emanating from the State, is a monstrous one. And yet it is clear that once you concede to the State the right to decrease the tolls which it allowed you to collect by a single mill, and you allow it to reduce the tolls to nothing. There is no half way. The right to take off one cent involves the right to take off all. The franchise, on the strength of which millions have been raised, may be destroyed and the millions wholly lost. If this is so, what was it that the State allowed to be mortgaged, to be sold, to be used as a credit to allure the money of foreigners and the aid of the United States. That this franchise is property, descendible, surviving, alienable like any other property, is clear from the very incidents affixed to it. But the question whether this franchise is property, is no longer an open one.

I take from the very able brief of Judge Sanderson, two citations; one from Chancellor Kent and one from Judge Story:

"Another class of incorporeal hereditaments are franchises, being certain privileges conferred by grant from government, and vested in individuals. In England they are very numerous, and are understood to be royal privileges in the hands of the subject. *They contain an implied covenant on the part of government not to invade the rights vested*, and on the part of the grantors to execute the conditions and duties prescribed in the grant. Some of these franchises are presumed to be founded on a valuable consideration, and to involve public duties, and to be made for the public accommodation, and to be affected with a *Jus publicum*, and they are necessarily *exclusive* in their character. The government *cannot resume at pleasure*, or do any act *to impair the grant*, without a *breach of contract*. The privilege of making a road, or establishing a ferry, and taking tolls for the use of the same, is a franchise, and the public have an interest in the same; and the owners of the franchise are liable to answer in damages, if they should refuse to transport an individual without any reasonable excuse, upon being paid or tendered the usual rate of fare. The obligation between the government and the owner of such franchise is mutual. * * * *An estate in such a franchise, and an estate in land, rest upon the same principle, being equally grants of a right or privilege for an adequate consideration.*

Speaking to this question, in the Dartmouth College case, Mr. Justice Story said:

"In respect to franchises, whether corporate or not, which include a pernancy of profits, such as right of fishery, or to hold a ferry, a market or a fair, or to erect a turnpike, bank, or bridge, there is no pretence to say that grants of them are not *within the Constitution*. Yet they may in point of fact be of no exchangeable value to the owners. They may be worthless in the market. The truth, however, is, that all incorporeal hereditaments, whether they be immunities, dignities, offices, or *franchises*, or other rights, are deemed *valuable* in law. The owners have a legal *estate* and *property* in them, and legal remedies to support and recover them, in case of any injury, obstruction or disseizen of them. * * * In respect to *corporate franchises*, they are, properly speaking,

legal estates vested in the corporation itself as soon at it is *in esse*. They are not mere naked powers granted to the corporation; *but powers coupled with an interest.* The property of the corporation rests upon the possession of its franchises; and whatever may be thought as to the corporators, it cannot be denied, *that the corporation itself has a legal interest in them.*"

I have thus shown that this franchise is a property right consisting of the right to collect tolls up to a certain limit—that this limit is an essential part of the franchise itself, and cannot be diminished without the right to take away the property altogether; that this property is a distinct grant and not a part of the corporate powers; that it can be alienated to corporations or individuals; that it can be parted with or acquired without affecting the corporate rights; that an individual may acquire it; and that when he does, he acquires it as a simple piece of individual property, without acquiring any corporate rights whatever.

It happens with one of your franchises that it was granted by the State in the same instrument which contained the law under which your corporation was formed or created; but it does not follow from this that the franchise itself is a part of your creation as a corporation. In the same instrument the State granted you rights of ways and other properties. In subsequent laws the State has contracted with you for services, has granted you subsidies, has granted to you lands and other property rights. All these contracts and grants are no more portions of your charter than are the grants, sales and privileges which you derive from the United States or from individuals. In other words, the State acts in two capacities. In the one case it agrees with you that you shall be a corporation.

In the other it grants to you certain properties—properties which it could just as well grant to an individual as to a corporation. Now, the Constitution only says, that laws creating corporations may be altered or repealed. It does not say that grants made to corporations, either by itself or other persons, can be altered or repealed. Can the State alter or repeal the grant made to this corporation by the United States, or the contracts made between them or the contracts made between the corporation and the mortgage creditors? Evidently not; for these form no part of the law creating the corporation. They are contracts made and property acquired under living powers unaltered and unrepealed; and these contracts and properties are no portion of the law under which the corporation was created.

And this brings me to another proposition which is this: that the properties of a corporation and its contracts and liabilities are really the properties, contracts and liabilities of the individual stock-holders; that a corporation, though in one sense, a distinct individual created by the law, is, in another and broader sense, an assemblage of individuals with individual rights; that a corporation is but a method or mode in which individuals acquire and dispose of property and make contracts; that the dissolution of a corporation is nothing more than stripping from the corporators the extraordinary powers which the law conferred upon them, and that when these powers are stripped from them by the dissolution of the corporation the corporators are really the owners of all the property which the corporation has acquired. It

would follow from this, that even if this corporation were dissolved, its property and franchises would still remain the property of the stockholders, and the State would not have the right even then to resume or impair any franchise or other property of the corporation.

Writers on corporations have become confused by the terms which they employ in speaking of them. They speak of a corporation as an individual created by the law, owing its whole existence to the law, and dying when it is dissolved. Hence they apply to it the old feudal doctrine—that is, that inasmuch as it has no heirs, its property, in its death, goes to the State; its debts are extinguished; it is a being which has disappeared and left no sign. This might be the case were it true that the State had created a monster unconnected with man, who could act by itself, and acquire property and make contracts. But the corporation is not, except by a fiction, an individual at all; it is merely an assemblage of men who act together in a way pointed out by the law, and who in that way acquire property and make contracts. In their aggregate capacity they have certain powers given them which they undoubtedly did not possess, as natural persons, and it is precisely these powers which constitute them a corporation. If the Legislature takes away these powers, it resolves the corporation into its original elements, that is an assemblage of individuals with only such powers as all individuals have. The very language of the laws under which corporations are created shows this to be the case. "Any number of persons, not less than ten,

may be formed into a corporation,"—then the law goes on to define what shall be the powers of these persons when thus formed into a corporation.

Here, then we have the composition of the corporation. It consists of a number of individuals who thus group themselves into a corporation and thus grouped have certain powers which distinguish them from individuals not thus grouped. These individuals thus became a corporation. They put into a common fund their private property; they acquire property, they contract debts —evidently the property thus acquired and the debts and liabilities thus contracted are the private debts, liabilities and property of these individuals. If three men own a mine, and for convenience sake put the mine into a corporation which they form, the mine may be said in one sense to belong to the corporation, but in a wider sense it is still the property of the individuals. After creating the corporation, the law goes on to show how individuals shall hold their rights in the corporate property. It is by means of shares or stock, each share being a right to an aliquot part of the corporate property and a liability to an aliquot part of its liabilities. Now these shares are the personal property of the stockholders. To take away the property of the corporation would be to take away the individual property of these stockholders.

Conceding that the Legislature might have the right to say to the individual, you shall no longer hold this property in the form of shares, it cannot say I will deprive you of this property altogether.

Or, it may say, you shall henceforth hold this property as any other individual does, but not in a corporate mode. Apply this reasoning to this case. The Legislature said to the ten men who originally formed this corporation: You may form yourselves into a corporation which may acquire and hold property in a certain manner, and I will give you certain privileges which will make the difference between you as individuals and you as a corporation. These men accepted and thus organized, went on, acquired property, made contracts, and received grants. Now, then, is it not clear that this fictitious individual thus created, is really no individual at all, but an aggregate of private individuals, acquiring private rights and incurring private liabilities? When, therefore, any property was acquired by this corporation it was really the property of the individuals who composed it, and their shares were but the evidence of their ownership and the mode of transferring it to others.

Hence it follows that, while the corporation exists, its property is the property of its stockholders and when it is dissolved, the assemblage of men who composed it are resolved into their original elements, and the property, debts, credits, and liabilities of the corporation survive to them. It would follow, then, looking through the corporate gauze, which the law weaves, to the real men underneath, that they are the real parties who have any rights in the property of the corporation. The fiction, called a corporation, has not even existence sufficient to cast a shadow.

It has neither shape, substance, mind, body, or power. It is but a mode invented by the law by

which men act and acquire. If this reasoning is correct, then it follows that when the State granted this franchise to this corporation, it really granted it to the men who composed this corporation. The franchise became the private property of individuals. The stripping the corporate form from these individuals would not affect the property rights which the individuals thus acquired.

Going one step further—it was these individuals who furnished the money which levelled mountains, laid down rails, built cars and made the franchise available, and the diminution of this franchise would destroy the property of these individuals. The attempt, then, to diminish the value of this franchise by reducing the rate of tolls fixed, is a direct attack on the private property of individuals, and as such is forbidden by the Constitution. And this brings me to my last proposition, which is, that the Legislature has no power to attach to any manner or mode of acquiring property, the condition that such property shall be at any moment subject to be taken away without compensation by the State.

The reasoning of those who assert that the Legislature has omnipotent power over a corporation, when written out, would come to this: that the Legislature can say to any set of men, Come together in a certain way, called a corporation, put your money and your real estate into that corporation, contract debts in that name, acquire in that name property, and then, after you have done it, I will reserve the power of at any moment dissolving you and taking away that property and cancelling all those debts. This is the power con-

tended for by those who disregarding the individual property which each stockholder has in a corporation and disregarding the fact that a corporation is but a mode and manner of acquiring private rights, assert that the Legislature can take away, at will, either directly or by dissolving the corporation, its property. I deny that any such power exists under the Constitution.

The Constitution, under which we live, is peculiar from all other Constitutions, in this — that it recognizes certain rights which are inalienable; rights which government itself cannot divest; rights which are so sacred, so inherent in the individual, that if government should attack them or attempt to invade them, the subject is freed from his allegiance. This is the language of the Declaration of Independence, of the Bill of Rights, of the Constitutions of the States, and of the Constitution of the United States. The right to acquire property is one of those inherent rights over which the Government itself is powerless, and which it is the great duty of Government to protect. This right to acquire property is so independent of the Legislature that our Constitution denies even the right of the whole people to give to the Legislature the power to take it away. The Constitution defines two classes of right:

First—The inherent individual and inalienable rights of the man.

Second—The political power that resides in the people and can be by the people delegated to the Legislature.

Among the rights which cannot be given to the Legislature, is the right to prevent men from ac-

quiring property, and this implies the right of keeping it when acquired. It follows, then, that every man has the right of acquiring and holding property. It follows, then, that the Legislature cannot deprive him directly or indirectly of this right.

Now then, let us suppose that the Legislature should attach as a condition to any particular mode or manner of acquiring property, the condition that the Legislature could immediately take that property away, would not this be to deprive the subject of his right to acquire and keep property? Suppose the Legislature should say to a grocer: I will allow you to carry on the grocery business, provided at any moment I can seize your stock. Suppose it should allow men to form themselves into partnerships on the condition that it should have the right to at any time dissolve such partnerships, and by such dissolution take all the partnership property. Or suppose it said to men: You may acquire property through the mode and manner of a corporation, provided you allow me at any time to dissolve the corporation, and take away all the property you have put in. Is it not clear that to thus allow the Legislature to attach a condition of confiscation to these different modes by which individuals acquire property, is to place the whole private rights of the individual at the mercy of the Legislature?

I have thus laid down the following propositions, which seem to me to be sound:

First—That the language of the Constitution, which gives the right to the Legislature to alter or repeal the laws creating corporations, does not

affect corporations which have availed themselves of the privilege of becoming corporations before these laws were altered or repealed.

Second—That the right to alter or repeal a law gives no right to alter or repeal a contract made while the law was in force; and that as a charter granted to a corporation and accepted by it, is a contract, the repeal of the law subsequent to the contract does not repeal the contract or charter.

Third—That even if the language of the Constitution could be made to mean that the Legislature had a right to withdraw, or destroy, or alter the charter of the corporation, still that such repeal or change of the charter would not authorize the Legislature to take away or impair the private property of the corporation.

Fourth.—That the right to collect tolls within certain limits is a franchise, which is itself private property, and which on the faith of the Legislative Act granting it has become interwoven with other vast private properties of the corporation in such a manner that it cannot be destroyed or impaired without destroying or impairing the whole property of the corporation.

Fifth.—That corporate property is really the property of the individual stockholders and can not be taken away by the Legislature without compensation.

Sixth.—That a corporation is but a mode and form by which private property is acquired, and that the Legislature cannot attach to any mode and form of acquiring property the condition that the owner shall surrender his property to the Legislature at its will.

In concluding this opinion, I cannot help saying that the people do not understand the questions involved in this discussion of the right of the Legislature to diminish, at will, the amount of the tolls which you have the right to collect. They do not understand that this right would imply the right to take away all corporate property; that on this principle the Legislature would have the right to take the money deposited in bank, to confiscate the policy of insurance, to take without compensation all the hard earnings of the poor in the savings banks, to divert from the will of the donor the money which he applied to charitable purposes,—in a word, to confiscate, at will, the vast means invested in corporations.

They do not understand that in attacking you, all corporations are attacked, and that an attempt is made to wholly change the Constitution of the country by putting private property entirely at the mercy of the Legislature, simply by enabling the Legislature to attach to a certain mode and manner of acquiring property, the condition that the owner shall forfeit it whenever the State chooses, without any compensation.

JOHN B. FELTON.

October 19, 1875.

H. S. Brown
Counsel for Cent. Pacific R.R. Co.

AN OPINION

AS TO THE POWER OF LEGISLATURES OVER THE CHARTERS OF PRIVATE CORPORATIONS WHERE THE CONSTITUTION OF THE STATE PROVIDES THAT SUCH CHARTERS MAY BE "ALTERED FROM TIME TO TIME, OR REPEALED," AND ESPECIALLY RAILROAD CORPORATIONS.

BY

S. W. SANDERSON,

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SAN FRANCISCO:
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SAN FRANCISCO:
H. S. CROCKER & CO., PRINTERS AND STATIONERS,
1875.

San Francisco, Oct. 10, 1875.

Leland Stanford,

President of the Central Pacific R. R. Co.

Sir:—In answer to your note of the 1st inst., requesting my opinion upon the question, whether the Legislature of a State, acting under a power to that effect, reserved in the Constitution of the State, can alter, amend or repeal a charter which it has granted to a private corporation, without the consent of the corporation, so as to impair the obligations of the charter, I have the honor to submit the following:

I.

The solution of the question depends upon the meaning of certain provisions contained in the Constitution of the United States, and certain provisions contained in the Constitution of the State. They are as follows:

FEDERAL CONSTITUTION.

Art. 1, Sec. 10. "No State shall * * * pass any bill of attainder, or ex post facto law; *or law impairing the obligation of contracts* * * *."

Art. 6. "* * *. This constitution, and the laws of the United States which shall be made in pursuance thereof, * * * shall be the *supreme law* of the land; and the judges in every State shall be bound thereby, *anything in the constitution or laws of any State to the contrary notwithstanding.*"

Art. 14, Sec. 1. "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property without due process of law;* nor deny to any person within its jurisdiction the *equal* protection of the laws; * * *."

STATE CONSTITUTION. (California).

ART. 1, Sec. 8. "* * * No person shall be subject to be twice put in jeopardy for the same offence; nor shall he be compelled, in any criminal case, to be a witness against himself; *nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.*"

ART. 4, Sec. 31. "Corporations may be formed under general laws, but shall not be created by special Act, except for municipal purposes. *All general laws and special Acts passed pursuant to this section may be altered, from time to time, or repealed.*"

II.

HISTORY OF THE QUESTION.

The history of this question, so far as it has been written, will contribute to a just appreciation of the views hereinafter taken.

In the year 1769 the British Crown, by special charter, created a private corporation, under the name and style of "The Trustees of Dartmouth College." The charter prescribed a form of government for the corporation and defined, with much particularity, its powers, jurisdictions, franchises, privileges, advantages, liberties and immunities. It was empowered, among other things, to acquire and hold lands for its use in the western part of the then province, now State, of New Hampshire, and to erect thereon such buildings as might be required for college purposes. The corporation was to have a perpetual existence. It was to be governed, and its affairs managed by a board of twelve trustees. *No power was reserved in the charter to alter, amend or revoke it.* Under this charter, the corporation of "The Trustees of Dartmouth College" was subsequently organized. It acquired lands and erected buildings thereon.

It carried out the objects of its creation by establishing a college, managing and governing its affairs according to the terms of its charter.

In 1816, nearly half a century after its creation, the Legislature of New Hampshire conceived the idea that it could improve the charter granted by the British Crown, and put the corporation upon a footing better adapted to the educational wants of the public. Accordingly, it passed an Act entitled "An Act to amend the charter, and enlarge and improve the Corporation of Dartmouth College." The Act entirely reorganized the corporation. In effect it created a new corporation under the style of "The Trustees of Dartmouth University," and endowed it with all the property, rights, privileges and franchises of the old corporation. The taking of effect of this Act was not made dependent upon the consent of the old corporation; on the contrary, the Act proceeded upon the theory that it was a legitimate exercise of legislative power. The old corporation did not accept the Act; on the contrary, it contested its enforcement. Thereafter, the legislature passed other Acts to aid in giving force and effect to the first, but the old corporation still denied the power of the legislature to disturb or interfere with its chartered rights. Finally, the new corporation was organized. To enable it to get possession of the books, titles and papers of the old corporation, it resorted to the expedient of appointing one Woodward, who had been holding the offices of secretary and treasurer under the old corporation, and, as such, had possession of the books, etc, to the same offices under the new corporation. Woodward accepted these

offices, and thus, by a trick, the new corporation obtained possession of the books, etc., of the old corporation. Previous to his appointment by the new corporation, Woodward had been removed from office by the old corporation. The old corporation demanded possession of the books, etc., but Woodward refused to surrender them. Thereupon the old corporation brought an action for the books, etc., against Woodward. The action ultimately found its way to the Supreme Court of the United States, where it was finally decided in 1819. The old corporation contended that its charter was a contract, within the meaning of that clause of the Federal Constitution, which declares that "the States shall pass no laws impairing the obligations of contracts." That the several Acts, of the State of New Hampshire, in question, impaired the obligations of its charter, and they were therefore repugnant to the said clause of the Federal Constitution, and, therefore, null and void. Both points were sustained by the Court, and from that time to the present, it has been the settled law of the land, that the charters of private corporations, whether found in special Acts or in general laws, are contracts within the meaning of the Federal Constitution. It was also decided, in that and other cases, that in the presence of this clause of the Federal Constitution, a State stands upon no higher level than a private individual, and that a contract, to which a State is a party, is as fully under the protection of that instrument as a contract between two individuals. There is no reasonable ground to apprehend that these principles will ever be departed from, and in all discussions

of the present and cognate questions, they must be regarded as unalterably fixed and settled.

Dartmouth College *v.* Woodward, 4 Wheaton, 518.

Providence Bank *v.* Billings *et al.* 4 Peters, 514.

Chief Justice Marshall, Justices Washington and Story delivered separate opinions in the Dartmouth College case. In the opinion of Justice Story the following passage is found :

"In my judgment it is perfectly clear, that any Act of a legislature which takes away any powers or franchises vested by its charter in a private corporation, or its corporate officers, or which restrains or controls the legitimate exercise of them, or transfers them to other persons, without its assent, is a violation of the obligations of that charter. *If the legislature mean to claim such an authority, it must be reserved in the grant.* The charter of Dartmouth College contains no such reservation ; and I am, therefore, bound to declare, that the Acts of the legislature of New Hampshire, now in question, do impair the obligations of that charter, and are, consequently, unconstitutional and void."—(Page 712.)

This language implies, that if a power to alter amend or repeal had been reserved in the charter, the opposite result might have been reached, and the acts of the legislature of New Hampshire might not have been repugnant to the constitution of the United States. Acting upon this suggestion, it afterwards became the fashion for constitutional conventions and legislative bodies to insert, respectively, in State constitutions and in general and special statutes for the creation of private corporations, a clause reserving such a power. Hence has arisen the most important, if not the most embarrassing, judicial problem of the age.

There was nothing in the Dartmouth College case which called for such a remark, and it was therefore strictly *obitur dictum*, and is entitled to no more weight than the off-hand suggestion of any other eminent lawyer. Had Justice Story given the subject a sober second thought it is more than probable that he would never have written those lines.

III.

THE OBJECT AND MEANING OF THE RESERVATION.

The foregoing history of this question shows clearly the object and purpose which constitutional conventions and legislative bodies intended to accomplish by inserting this reservation in the constitutions and statutes respectively framed by them. Their sole purpose and object was to overcome and practically annul the rule announced in the Dartmouth College case. It was supposed that the rule in that case was pregnant with evil consequences—that it was a new Pandora's box, from which all manner of ills might escape and work mischief to the public well-being; and it was deemed necessary to guard against these apprehended mischiefs by providing some means by which corporations should be debarred, in the future, from the privilege of appealing to the protection of the Federal constitution against attacks upon their charters, should their rights and privileges under them become oppressive to the people. The means by which this might be done had been suggested by a judge of the highest court in the land, and they were adopted. The object and purpose, the intent and meaning of this reservation

cannot be disguised. It was to confer upon the States a power which they did not previously possess—a power which the Federal constitution had forbidden them to exercise. It was to erase from the Federal constitution the clause which declares the inviolability of contracts, so far as contracts in the form of charters of private corporations were concerned. It was to render *violable* that which the Federal constitution had declared should remain *inviolable*. It was to subordinate the Federal constitution, in the particular in question, to the will of the States, as expressed in their constitutions and their statutes; or, to put it in the language of its advocates, to subject the federal constitution, *pro tanto*, to the control of a higher instrument, to-wit, *a private contract*.

Had this power been reserved in the following language: "The Legislature shall have power to impair the obligation of all charters granted by them to private corporations without their consent," the purpose would not have been more obvious—the intent and meaning would not have been plainer.

That such is the object and meaning of this reservation, is further evident from the total absence from the case of any other rational object or motive. Unless it was intended to subserve the purpose suggested, what other purpose was there which it could have subserved? In that case, there was no purpose which could not have been accomplished without it, as well as with it. It certainly was not needed to enable the legislature to pass laws at the request of private corporations. It was not needed to enable legislatures to pass

laws which would benefit private corporations. It was not needed to enable the legislature to pass laws of a police nature to secure the safety of the public, or to coerce private corporations into a faithful and full performance of their obligations and duties under their charters, or to terminate the existence of the corporation, on account of non use or fraud or abuse, or to retake the franchises when they should become burdensome or oppressive, for that could have been done as now, under the power of eminent domain, or generally, to pass any laws which would not have had the effect to impair the obligations of charters, for without such a reservation the legislature could have passed any of those laws, for the Federal Constitution forbids *only* the passage of laws which will impair the obligation of contracts. As to all laws which will not have that effect, the States had been left to their own discretion untrammeled by the Federal Constitution.

In view of the history of the question and the only mischiefs supposed to exist, and to demand a remedy, after the Dartmouth College case, there can be no reason to doubt the object and meaning of the reservation in question. It was, as already stated, to enable the States to avoid the force and effect of the Federal Constitution. To enable the States to do precisely what the language of the reservation imports, *to alter or repeal* charters of private corporations, so as to retake their franchises, advantages and privileges without making any compensation therefor, or without resorting to the power of eminent domain—a remedy which is always open to the States where franchises have

been improvidently granted, and public convenience or need require that they be allowed to exist no longer. Such is its meaning, or it has no useful meaning at all. There is no middle ground. It does not mean less than its language imports. To hold that it does is to leave its meaning in doubt and uncertainty; still worse, it is to hold, that it has no practical, or necessary, or useful, or rational meaning whatever; and that it is a false quantity in all questions relating to the legislative power of the States over private corporations, for, as already stated, if it means less than a power to impair charters, it adds nothing to such power as previously existed.

IV.

WHAT THE COURTS THINK OF ITS MEANING.

Without some reference to what the courts have said in relation to the scope of this reserved power, any discussion of the question would be incomplete. Yet whoever undertakes to deduce from the decisions of the courts an intelligible, consistent and uniform rule upon this subject, will undertake a difficult task. In going over their decisions he will find that the courts have "blown hot and cold." Talking in a general and loose manner, they have repeatedly said, in effect, that if a power to alter, modify, or repeal charters of private corporations be reserved in a State constitution, or in a general law, older than the charter in question, or in the charter itself, a subsequent exercise of the power so reserved by the legislature, even against the consent of the corporation, is not a

violation of the Federal Constitution, or, in other words, that a charter granted upon such a condition is not within the protection of the Federal Constitution. Such language seems to assume the meaning and object of the reservation to be, as stated above, to enable the legislature to make such changes in a charter as would impair its obligation within the meaning of the Federal Constitution. But whenever a case has arisen in which the power to do so is brought directly in question, we find the courts beginning to recede and to search for a meaning of less startling import. Then we are told that this power, which we have been led to suppose was without other limit than the discretion of the legislature, has in fact other limitations, but precisely what those limitations are we are not informed. An example of this uncertain and unsatisfactory interpretation is found in the case of Miller *v.* The People of the State fo New York, decided by the Supreme Court of the United States. (15 Wallace, 478.)

In the case referred to, Justice Clifford, after going into a lengthy discussion of the general question, and apparently showing conclusively that, under this reserved power, the legislature may amend, alter or repeal charters *ad libitum*, he suddenly becomes alarmed at the appalling consequences to which the doctrine may lead. He suddenly perceives that the rule he is announcing, carried to its logical extreme, may lead to the destruction of fortunes, to the violation of contracts, to the despoiling of individuals, to the divesting of vested rights, in short, to nullification of some of the most salutary rules of constitutional law.

without which civilized society cannot exist. So, after showing that the power "to alter or repeal" exists, and without any apparent limitations or qualifications, he proceeds to show that it has some limitations nevertheless. He says:

"Power to legislate, founded upon such a reservation in a charter to a private corporation, *is certainly not without limit*, and it may well be admitted that it cannot be exercised *to take away or destroy rights acquired by such a charter*, and which, by a legitimate use of the powers granted, have become vested in the corporation; but it may be safely affirmed that the reserved power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant, or to secure the due administration of its affairs so as to protect the rights of stockholders and of creditors, and for the proper disposition of the assets.

"Such a reservation, it is held, will not warrant the legislature in passing laws to change the control of an institution from one religious sect to another, or to divert the fund of the donors to any new use inconsistent with the intent and purpose of the charter, or to compel subscribers to the stock, whose subscription is conditional, to waive any of the conditions of their contract."

It is not a little surprising that so eminent a justice as Justice Clifford did not himself perceive that, in using the foregoing language, he virtually stripped the clause "to alter, from time to time, or repeal," of all meaning; for if the legislature cannot, under it, do the acts enumerated by him, and other like acts, then nothing remains to the doing of which the clause in question is necessary, for every act, which he affirms can be done under it, can be done without reference to it—can be done as fully and completely as if such a clause had never found a place in the English language; for, as I have already stated, those acts, and other like acts, are not within the prohibition of the Federal Constitu-

tion, for the obvious reason that they do not impair the obligation of the charter, and not being within that prohibition, the legislature had, as to them, plenary power, before the clause "to alter, from time to time, or repeal," had found a place in the law of the land.

Another example of these decisions is found in the case of Sage *v.* Dillard, (15 B. Monroe 340.) In that case it was held that a reservation in a legislative charter of a power to alter, repeal, or amend the same, does not imply the power to alter the vested rights acquired by the corporators under the charter, and to add new parties and managers *without the consent of the corporators.* And that such a reservation carries with it the necessary implication of a power in the corporators to accept or reject any amendment or alteration made by the legislature.

If such be the case, what does this reserved power amount to? In a legal or constitutional sense, of what value is it? If the implication mentioned exists, and the legislature can, therefore, do nothing, under the power, except by the consent of the corporators, what is there that it can do under it which it cannot do equally as well without it?

The case of Miller *v.* New York and Erie R. R. Co., (21 Barb., 513), furnishes another example. The defendant's charter did not impose upon it the burden of constructing new roads laid out across its track; but it contained a reservation of legislative power to alter, modify or repeal it. After the construction of defendant's road, an Act was passed providing that highways might be laid

out across the track of any railroad, without compensation to the corporation owning it, and requiring the railroad company to construct the crossing, under penalty for neglect. The Court held that the Act was unconstitutional in its application to the defendant—that the power reserved in the charter did not include the right to authorize the taking of their property without compensation.

The case of the Commonwealth *v.* Grey (13 Gray, 239) is another instance where it is shown that the clause in question does not mean what its framers intended it should mean, and what, *by its terms*, it does mean, if it means anything new, or different from what existed before its adoption. A mill company were required by their charter to construct and maintain sufficient fishways for the passage of fish up the stream, to be approved by the county officers, and they constructed such as were approved by those officers, but they afterwards proved insufficient, and the legislature subsequently granted the application of the company for an amendment to their charter, with a proviso that the company should indemnify all persons having fish rights which were injured by the dam. and the company accepted the act, and paid large sums of money for such damages. The Court held that this constituted a contract between the company and the State, such, that the legislature could not subsequently impose upon the company the duty of constructing new fishways, even though they had by a general law reserved power to annul and repeal all charters.

In delivering the opinion of the Court, Chief Justice Shaw said :

"Does this come within the power of the legislature to amend or alter? It seems to us that this power *must have some limit*, though it is difficult to define it. Suppose an authority has been given by law to a railroad corporation to purchase a lot of land for purposes connected with its business; and they purchase such lot from a third person, could the legislature prohibit the company from holding it? If so, in whom would it vest; or could the legislature direct it to revest in the grantor, or escheat to the public; or how otherwise?

"Suppose a manufacturing company, incorporated, is authorised to erect a dam and flow a tract of meadow, and the owners claim gross damages, which are assured and paid; can the legislature afterwards alter the act of incorporation so as to give to such meadow owners future annual damages? Perhaps from these extreme cases — for extreme cases are allowable to test a legal principle — the rule to be extracted is this: that where, under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted."

But in the case of Holyoke Company *v.* Lyman, 15 Wallace, 500, the opposite conclusion was reached, upon the ground that the statute requiring the construction of fishways was a legitimate exercise of the legislative right to regulate and conserve the public right of fishery. That such legislative right was an implied condition annexed to the grant of a right to build a dam, and accordingly such a grant was not impaired by subsequent legislation of such a character.

Numerous other decisions might be referred to, where the Courts have vainly attempted to define this reserved power, but they are all to the same effect as those which have been noticed. They all have this vice—they seemingly overlook the sole purpose for which this clause "to alter, amend or

repeal" has been incorporated in the law of the land, and having done this, they have failed to discover, that its true intent and meaning was to overturn the Federal Constitution, so far as it prohibits the States from impairing the obligation of charters, and that if it cannot be allowed to have that effect, it neither has, nor was intended to have any effect. Failing to give to it its true interpretation, they have attempted to assign to it a field of action for which it was not intended — a field which was already occupied, and in doing so, have involved the principal question in a sea of doubt and uncertainty. If any rational or consistent rule can be deduced from these decisions, it is this: that acting under this reserved power, the legislature can do no act which will injuriously affect the property, rights and franchises of the corporation, but may do any other act which will not have that effect. This emasculates the clause "to alter or repeal" and leaves it a dead letter in the law of the land, for all that can be done under it can be done without it, and the principal question is left to stand precisely where it stood when the Dartmouth College case was decided.

So far as practical results are concerned, it matters little whether the foregoing interpretation, or the one suggested by me, be adopted, for, as between them, there is no difference in respect to the consequences which follow; but if, in the matter of definition, precision and clearness are desirable, there can be no question as to which should be preferred. The one tends to show that the clause in question is merely superfluous, the other that it is unconstitutional, as well as superfluous. The

one is confused, vague and uncertain; the other plain and intelligible.

The true intent and meaning then of the clause "to alter from time to time or repeal," being, that the legislature may alter or repeal so as to predjudice the rights granted or acquired under a charter, without making compensation, and without the consent of the corporation, the next question is as to its true value as an element of State constitutional law.

V.

A STATE CONSTITUTION WHICH CONTAINS THIS CLAUSE, IS ITSELF, SO FAR, UNCONSTITUTIONAL.

1st. Because it is repugnant to that clause of the Federal Constitution which prohibits the States from "passing any law impairing the obligation of contracts."

2nd. Because it is repugnant to that clause of the Federal Constitution, which prohibits the States from "depriving any person of life, liberty, *or property* without *due process of law;* or denying to any person within their jurisdiction the *equal protection* of the laws."

AS TO THE FIRST GROUND.

Treating the clause "to alter or repeal" as being a *rule of law*, enough has been already said to establish the point, that it is repugnant to that clause of the Federal Constitution which affirms the inviolability of contracts. The Federal Constitution says: "No State shall pass any law impairing the obligation of contracts."

The State Constitution says: "The legislature may "alter from time to time, or repeal the charters (contracts) of private corporations."

When one person says: "You shall not," and the other replies: "I shall," it is evident that there is an "irrepressible conflict" between them.

But those who hold that this reserved power is constitutional, that is to say, not repugnant to the Federal Constitution, maintain that the clause in question is not a *mere rule of law*, but *a contract* between the State on the one side, and the corporation on the other; or, in other words, that it is a part of the charter; and, accordingly, when the State undertakes to alter or amend or repeal the charter, it is not acting as a law-maker, but as a party to the contract, and is not exercising a right which it possesses as a law-maker, but a right which it has acquired by *contract*, and possesses as an individual.

There are some who claim that a railroad corporation is only the naked agent or trustee of the State exercising a naked power, that is to say, a power not coupled with an interest, and which may, for that reason, be revoked by the State at any time. This doctrine will be considered hereafter

That this contract theory is ingenious and plausible must be admitted, but that it is sound or tenable is denied. Upon a critical examination, it will be found that this theory, if it proves anything, proves too much, and must fall under its own weight.

This view concedes (which is true) that the State and the corporation stand upon a common level; that the State abandons its capacity of sovereign and becomes a mere individual, with the same, but no greater powers, in the premises, than the corporation. Upon this common ground, the

State and the incorporators meet. The latter say to the former: "We desire to obtain from you a charter under which we can organize ourselves into a railroad corporation, for the purpose of building and operating a railroad between A and B. We propose to purchase the right of way with our own money, and to construct, equip and operate the road at our own expense. In consideration of our doing all this, we ask you to grant us the right to use the power of eminent domain, and to agree that we may make certain charges in the nature of tolls, for travel and transportation over our road, and that the maximum of such charges be fixed in the charter, in order that there may be no misunderstanding about them hereafter." To this the State replies: "The public needs the road which you propose to build, and its construction will promote the public interest, and I will grant you the right to exist as a corporation, and to do business as a corporation, to make contracts, the same as a natural person, to sue and be sued by your corporate name, to acquire and hold such real and personal property as you may require for the purposes of your road, and that you may be able to exercise this right upon reasonable terms, I will grant you the right to use the power of eminent domain, also the power to borrow money upon bond and mortgage, and to compensate you for building and operating the road, I will grant you the right to collect reasonable tolls for the transportation of passengers and freight, say not to exceed ten cents per passenger per mile for the former, and fifteen cents per ton per mile for the latter, which charges I think are reasonable, and

I will allow you to exist as a corporation, and carry on the railroad business, upon these terms, for the period of fifty years. But if I make this agreement with you, that is to say, grant you this charter, the charter, when granted, will amount to a contract, which I cannot hereafter alter, modify or annul, so long as you faithfully observe it on your part, without your consent, which you may not give. To be frank with you, the Federal Constitution *prevents me from interfering with the charter*, to your prejudice, so long as you act in good faith, and perform all your obligations under it. Now I do not propose to be bound by the Federal Constitution in this matter. I may hereafter find that you have got the best of me in making this bargain, and I may want to turn the tables on you, and get even by changing the terms of the charter, and if such changes should impair the value of your property, or destroy your business, I am not willing to be obliged to pay you any damages which our own constitution would otherwise require me to pay. In short, you are to understand *that you are to be bound by this contract, but that I am not.*"

Such is a fair statement of the so miscalled contract. Nevertheless it is accepted, and the incorporators having organized and built the road with their own money, and the money of other parties which they have borrowed, and to secure which they have mortgaged their road and franchises; and having carried on the railroad business for a series of years, faithfully performing all their duties and obligations under the charter, the State, perceiving that the charter has proved to be profitable to the incorporators, and that they are making

money; or perceiving that the corporators have become powerful and have too much influence in politics, or that they think they have the same interest in a good and stable government—one which will protect all persons in the enjoyment of their lives, liberties and properties—that everybody else has; or that they have the right to vote for persons of their choice for office; or acting upon any other reason which wisdom or malice may suggest, concludes to curtail their profits, to crush their power, and thereupon passes a law cutting down their tolls to half a cent per mile for passengers and three-fourths of a cent per ton per mile for freight. To this the incorporators object, and say: We cannot carry on our business at such rates; we cannot pay the expenses of the business, nor the interest on our bonds, nor the principal thereof, nor ourselves any profit on the money which we have invested in our road and equipments. We shall have to quit the business, and all of our property, which is good for little or nothing unless it can be used in the business, will become lost to us, and our creditors will lose their money, for we shall be unable to pay them, nor, if the business is stopped, will they be able to make their money out of our property, for, unless it can be used in the business, it will bring little or nothing at a forced sale; besides, to secure them, we have mortgaged our right to the *tolls*, which you *agreed* we might charge, and which you *agreed* we might mortgage, and this law of yours will strip the security of all its value. Besides, we have entered into a number of contracts for the transportation of freight at certain rates, which are

not more than reasonable, yet, under this law of yours, we cannot collect them, but will have to do the work upon the terms of the new law, or pay heavy damages for non-performance of our contracts." To this the State replies: "What you have said is all true, but you must bear in mind that it was understood between us that I should have the right to do this. You must remember that it was expressly agreed that *you were to be bound by the charter, but that I was not.* It is true that this law will lessen the value of your property very much, and will destroy in a measure the security which your creditors have taken for their money, but still I cannot allow you to stop business. You have agreed to carry on this business for fifty years, and the stoppage of the business would be ruinous to my people. They cannot do without your road. Hence I shall not allow you to stop operating it. If you do, I will put my Courts on your track, and direct them to go after you with an injunction, or a mandamus, or a decree for specific performance, or some other writ, process, proceeding or decree known to the law, and compel you to operate your road according to the terms of the new law; and if you refuse to do so, I will direct them to go after you with an attachment for contempt of court, and, if you still continue disobedient, I will cause them to issue a commitment and send you to jail, there to remain until you declare a willingness to obey the law. This may seem hard to you, but I must have my 'pound of flesh,' no matter how much you may bleed, for 'it is so nominated in the bond.' If you grumble at this, I will repeal your charter, and leave you

and your creditors to extricate yourselves from whatever situation the repeal will leave you in, the best way you can. In that case, I do not know what will become of your property, or what remedies your creditors will have to get their money. Under the common law, you being dead, which you would be if I repeal your charter, your property would escheat and all come to me, which would be a very good thing for me. But it may be that this harsh rule of the common law has been relaxed in this country, where the enlightened progress of the people has suggested the necessity for more efficient protection to the rights of property. In either case, I shall leave the matter in the hands of my judges to determine, if they can."

Such is a fair statement of the nature and results of the only plausible theory upon which the constitutionality of this reserved power is sought to be maintained. It will not do to say that the picture is overdrawn, or that the case supposed will never arise. It has already arisen, substantially in the State of Wisconsin. Besides, we are dealing with a question of legislative power—with a legal principle, and in the language of Chief Justice Shaw, "Extreme cases are allowable to test a legal principle." If the power exists at all, it exists to the extent supposed, and the recent proceedings in Wisconsin justify the apprehension that it may be exercised at any time to its full extent.

In view of the pernicious consequences which attend upon the exercise of this reserved power, it is a matter of wonder, that its existence has ever become a mooted question, especially in a country

where so much care has been taken to make the security of property and the inviolability of contracts the corner stones of the social compact. Yet, strange as it may seem, such is the case, and men of learning and ability are found, who, in apparent good faith, argue for the existence of this power, and insist that all of these consequences may follow its exercise, *without a violation of constitutional law;* and even judges are found who solemnly declare that such acts are not forbidden by the paramount law of the land.

In view of such conditions private corporations may well exclaim: "Oh! for a modern Portia to teach this modern Shylock that he has overreached himself"—to say to him, "yes, you shall have your pound of flesh, for it is so nominated in the bond, but not one drop of blood;" you may "alter from time to time, or repeal" this charter, for it is so written in the charter. Alter or repeal it, but, in doing so, see to it that you take not one dollar of property, that you do not impair the obligation of a single contract, for it is also written in the charter that you shall not impair the obligation of a contract, or take private property for your use without making just compensation, or deprive any person of his property without due process of law."

One of the most remarkable anomalies, involved in this contract theory, is that an act which would be unconstitutional, otherwise, may be made constitutional by force and effect of a *private contract.* It concedes that a power contained in a State Constitution to impair a contract is unconstitutional, but insists that if the power be transferred to the contract, it, *es instanti*, becomes constitutional;

or, in other words, that the Constitution of the United States is not a fixed and unchangable rule for the determination of private rights, duties and obligations, but that its provisions may be altered, or even entirely set aside, by a convention to that effect between private parties. If the Federal Constitution, in the particular in question, may thus be made the subject of trade and traffic between States and their citizens, what is there to prevent them from agreeing between them—the State as one party, and the people of the State as the other party—that, as to all internal matters, the entire Federal Constitution shall become a dead letter, and the Constitution of the State, and the statutes made in pursuance thereof, shall be the sole rule of decision in all controversies? Certainly if one clause of the Federal Constitution may be set aside by a private contract, by parity of reason, the next in order may be set aside, and so on to the end of the list, and the future historian, who searches for the constitution of the country, cannot safely confine his search to the public archives; he must extend his examination to the private papers of the people of the country, and ascertain from them how far the Constitution has been modified, or suspended, *by private contracts.*

If a State has the power to nullify this clause of the Federal Constitution, in the case of charters of private corporations, no one will deny to it the power to do so in respect to all its contracts, whether made with corporations or natural persons. It can incorporate such a clause into every grant of lands, franchises and privileges made to natural persons, and afterwards convert a fee sim-

ple into a tenancy at will, or terminate the estate, franchise or privilege, and thus destroy in a measure the ends and objects of government, and take from its grantees the very rights which governments are organized to protect and defend.

Another remarkable anomaly in this contract theory, is, that a contract may be binding upon one party and not upon the other. It has always been supposed that a contract can exist only where both parties are bound by its terms, unless the case in hand forms an exception to the rule. It must be logically true that where one of the parties reserves the right to alter or rescind the contract, without legal cause therefor, and without the consent of the opposite party, the obligation created by the contract is not mutual. Nor is the obligation made mutual by the fact that this reserved right of the one party is assented to by the other. Where such conditions are found there is either no contract at all, or the reserved right constitues no part of the contract, but is extrinsic, and, by itself, constitues only a *naked agreement*, without consideration, out of which no cause of action can arise.

Another anomaly of this contract theory is, that it recognizes a capacity in the citizen to trade away his right to appeal to the Federal Constitution for that protection which it affords to his property and other rights. The right to so appeal is inalienable. It is a right which the public, as well as the individual, is interested in maintaining. The opposite doctrine is hostile to the idea of government, and subversive of its ends and objects.

Trial by jury is not more inestimable than the inviolability of contracts. Suppose that a State

should insert a proviso, in the charter of a private corporation, that all disputes arising in the business of the corporation, or affecting its rights of property, should be submitted to arbitration, or to the decision of a judge acting without a jury, is any one prepared to assert that such a proviso, though expressly assented to by the corporation, would be binding upon it, and that when brought into Court, for any cause, it would be thereby precluded from demanding a jury, notwithstanding the Constitution declares that "the right of trial by jury shall be secured to all, and remain inviolate for ever."

Suppose a State should pass a law to the effect, that no private corporation of another State should be permitted to transact business in the State, unless it first appoints an attorney, in the State, on whom process of law can be served, and agrees that it will not remove any action that may be brought against it in the Courts of the State into the Federal Courts for trial; and suppose a corporation of another State should accept this condition, and appoint an attorney, and agree not to remove any action brought against it in the Courts of the State to the Federal Courts for trial, would such a statute or agreement be binding upon the corporation and prevent it, when sued in the State Courts, from appealing to the Federal Constitution and the laws made in pursuance thereof, and demanding that the action be transferred, as therein provided, to the Federal Courts for trial?

This question has been recently answered, *in the negative*, by the Supreme Court of the United States.

In 1870, the legislature of the State of Wisconsin passed a statute to the following effect:

"It shall not be lawful for any fire insurance company, association, or partnership, incorporated by or organized under the laws of any other State of the United States, or foreign government, for any of the purposes specified in this Act, directly or indirectly, to take risks or transact any business of insurance in this State, unless possessed of the amount of actual capital required of similar companies formed under the provisions of this Act; and any such company desiring to transact any such business, as aforesaid, by any agent or agents, in this State, shallfirst appoint an attorney in this State on whom process of law may be served, containing *an agreement that such company will not remove the suit for trial into the United States Circuit Court or Federal Courts, and file in the office of the Secretary of State a written instrument, duly signed and sealed, certifying such appointment, which shall continue until another be substituted.*"

This statute being in force, the Home Insurance Company, a corporation formed under the laws of the State of New York, being desirous of engaging in business in the State of Wisconsin, established an agency there, and in compliance with the provisions of said statute, filed in the office of the Secretary of State of Wisconsin an appointment of H. S. Durand as their agent in it, on whom process might be served. This power of attorney contained the following clause:

"And said company agrees that suits oommenced in the State Courts of Wisconsin shall not be removed, by the acts of said company, into the United States Circuit or Federal Courts."

Being thus established in the State, the Company issued a policy of insurance, and a loss having occurred under it, an action thereon was brought against the Company in one of the State Courts. The Company entered an appearance, and moved that the action be transferred for trial to the

Circuit Court of the United States, pursuant to the provisions of the twelfth section of the Federal Judiciary Act of 1789. The section under which the Company demanded the removal is as follows:

"If a suit be commenced in any State Court * * * by a citizen of the State in which the suit is brought, against a citizen of another State * * * and the defendant shall at the time of entering his appearance in such State Court, file a petition for the removal of the cause for trial into the next Circuit Court to be held in the district where the suit is pending * * * and offer good and sufficient surety for his entering in such Court, on the first day of its session, copies of said process against him, and also for his there appearing * * * it shall then be the duty of the State Court to accept the surety and proceed no further in the cause."

The Court denied the motion for a removal. The case was tried and a judgment against the defendant was rendered. The Company appealed to the Supreme Court of the State, which affirmed the judgment, holding that the statute of the State, and the agreement of the Company under it, were not repugnant to that clause of the Constitution of the United States, which declares "that the Constitution of the United States, and the laws made by Congress in pursuance thereof, shall be the supreme law of the land," and hence they were, therefore, binding upon the Company. Not satisfied with this solution of the question, the Company took the case to the Supreme Court of the United States, where it was decided at the last term of that Court. That Court, in an elaborate and well considered opinion, delivered by Mr. Justice Hunt, reversed the judgment of the Supreme Court of Wisconsin, holding that the statute and agreement, in question, were repug-

nant to that clause of the Federal Constitution which declares the Constitution of the United States, and the laws made in pursuance thereof, the supreme law of the land. The points decided were:

"1st. The Constitution of the United States secures to citizens of another State than that in which the suit is brought, an *absolute* right to remove their cases into the Federal Courts, upon compliance with the terms of the Act of 1789.

"2d. The statute of Wisconsin is an *obstruction* to this right, is repugnant to the Constitution of the United States and the laws in pursuance thereof, and is illegal and void.

"3d. The agreement of the Insurance Company *derives no support from an unconstitutional statute* and is as void as it would be *had no such statute been passed.*"

Insurance Company *v.* Morse, 20 Wallace, 445.

The question involved in that case differs from the question under consideration in circumstance, but not in principle. The solution of each turns upon the power of a State to set aside the Federal Constitution by force of a convention between itself and a citizen, which it erroneously calls a contract. If we look to the comparative merits of the two questions, the question under discussion must be conceded to be of vastly the most importance. Whether a citizen is entitled, under the Federal Constitution, to have his contracts, or his rights and liabilities under them, litigated and determined in the Federal Courts instead of the State Courts, is a question of minor importance to the question whether he shall be allowed at all, in either forum, to invoke the protection of the Federal Constitution against a violation of his rights under it. The former

merely involves a choice of forums, the other involves a principle—the right to appeal at all, in any forum, to the protection which the Federal Constitution professes to afford him in a matter of vital importance.

If, as the Court holds, the statute of Wisconsin was unconstitutional because it obstructed the defendant in the exercise of a right secured to him by the Federal Constitution, by parity of reason, the constitution of a State which contains the clause "to alter or repeal," is also unconstitutional, because it obstructs private corporations in the enjoyment of a still greater right secured to them by the Federal Constitution.

If, as the Court holds, the agreement of the defendant derived no support from the unconstitutional statute of Wisconsin, by parity of reason, the agreement in question, of private corporations, derives no support from an unconstitutional provision in a State Constitution; for, as all admit, State constitutions and State statutes stand upon a common level in the presence of the Federal Constitution.

If there were no other grounds upon which to combat this contract theory, it must be held untenable upon grounds of public policy alone. In Fletcher *v.* Peck (6 Cranch. 135), Chief Justice Marshall said: "It may be doubted whether the *nature* of society and of government does not prescribe some limits to legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?" It is familiar law that a contract or promise

to do an act which is forbidden by law, or to omit to do an act enjoined by law, is illegal and will not support an action. In this case the Federal Constitution declares that the obligation of contracts shall not be impaired. The declaration has its origin in that broad public policy which underlies all laws, be they constitutions or statutes; a policy which all constitutions and all laws are made to administer. Public policy requires that the obligation of contracts shall be inviolable. That policy finds expression in the Federal Constitution: "No State shall pass any law impairing the obligation of contracts." This policy is attempted to be defeated by a State Constitution or a State law, it is immaterial which, or by a contract between the State and a large class of individuals existing in the form of bodies politic and corporate. It is agreed between them that the State may do precisely what the paramount law forbids. That such an agreement defeats, so far, the public policy which dictated the prohibition, is manifest; and that it is, for that reason, illegal and void is equally manifest.

This contract theory develops still another anomaly in the law of contracts. It is said that the right of the legislature to "alter or repeal" does not result from a rule of law, but is created by private convention between the State and incorporators, and that when the State undertakes to exercise it, it does not act as a sovereign, or lawmaker, but as a contracting party—that it does not enact a rule of law, but acts merely in performance and pursuance of a contract. The agreement claims more than the facts of the case

will justify, and if it proves anything proves too much.

The clause in question cannot be considered, in any just sense, as constituting a part of the subject matter of the contract. That is exhausted when the building and operating of the road on the one side, and the granting of the power of eminent domain, the right to collect tolls, and other franchises, on the other side, have been provided for. It is true, that in a certain sense, this clause enters into and becomes a part of the charter; but it is in the same sense, and in no other sense, in which all laws relating to contracts enter into and become a part of such contracts. Contracts are made with *reference* to the law, but not to determine what the law shall be. Besides, if the clause "to alter or repeal" enters into and becomes a part of the charter of a private corporation, by parity of reason, the clause that "no State shall pass any law impairing the obligation of contracts," also enters into and becomes a part of the charter; and so of the clauses "private property shall not be taken for public use without just compensation," and "nor shall any State deprive any person of life, liberty, or property without due process of law." Yet no one will claim that these latter clauses enter into a contract as a subject of convention between the parties. They are all mere rules of law by which the contract is governed, and the rights of the parties are to be determined, in case controversies shall arise. To speak of them as constituting a part of the contract, in the sense of this contract theory, is to confound the subject matter of con-

tracts with the rules of law providing for making, interpreting, and enforcing contracts. It is an insult to the average intelligence of the commercial world, and a reproach to the law, to call such an agreement a contract. It is a mere pretext on the part of the State for an atrocious violation of private property—a violation forbidden by the Federal Constitution—forbidden by every principle of natural justice.

The falacy of the doctrine, that a citizen has capacity to thus trade away the rights which have been guaranteed to him by the Federal Constitution, may be further illustrated.

The Federal Constitution declares that "the right of the people to keep and bear arms shall not be infringed;" that "neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." No one will claim that a citizen, upon whatever consideration, has capacity to make a contract which, if valid, would debar him from the right to bear arms for the defense of his person or property; or that he may by contract consign himself to the condition of slavery; yet the right of self-defense, or the right to defend one's property, or to be secure in the freedom of his person, if of greater importance than the obligation of his contracts, are so only in degree. Indeed, the inviolability of contracts may be said to be incidental and indispensable to the complete exercise of the right to acquire, possess, and enjoy property, and if the citizen has any rights, under the

Federal Constitution, which he cannot trade away, which are inalienable, the inviolability of contracts must be classed among them. Speaking to the question in hand, in Fletcher *v.* Peck, 6 Cranch, 87, the Supreme Court of the United States has said:

"Whatever respect might have been felt for the State sovereignties, it is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions, on the legislative power of the States are obviously founded on this sentiment: *and the constitution of the United States contains what might be deemed* A BILL OF RIGHTS *for the people of each State.*"

While the constitution of the United States does not, in terms, contain a bill of rights, yet, as stated above, the prohibitory clauses of that instrument properly fall within the scope and purpose of a bill of rights, where the bill of rights is resorted to for the purpose, in part, of framing a constitution. Thus, the clauses of the Federal Constitution in relation to religion, freedom of speech and the press, the right to bear arms, billiting soldiers in time of peace, unreasonable seizures and searches, bills of attainder, *ex post facto* laws, laws impairing the obligations of contracts, taking private property without due process of law, slavery or involuntary servitude, and the right of suffrage, all fall within the perview of a bill of rights, and, where a bill of rights is employed, are universally included in it. Hence, as remarked by the Court, in Fletcher *v.* Peck, for all the

purposes of construction, they are to be considered as constituting a bill of rights for the people of each State, and the rights of citizens under them are to be considered as immutable and *inalienable*. The action of a State in inserting in its constitution, or its general or special statutes, in relation to the formation of private corporations, the clause "to alter or repeal," is an attempt to abridge these inalienable rights, so far as that clause authorizes legislation which will have the effect to impair the obligation of charters, and to that extent, at least, it is unconstitutional and void.

My conclusions upon this branch of the general question are:

1st. That the power "to alter from time to time or repeal" the charter of a private corporation reserved, in a State constitution or statute, is intended to enable the State to do indirectly what it cannot do directly, to-wit, impair the obligations of charters of private corporations.

2d. That, such being its true interpretation, it is repugnant to that clause of the Federal constitution which prohibits the States from passing any laws impairing the obligation of contracts, or;

3rd. If, as the decisions of the Courts imply, it is to be interpreted as also enabling the State to pass laws, in relation to private corporations, which do not impair their charters, that, then, it is unconstitutional as to the former, and superfluous as to the latter, and ought therefore to be considered as a false quantity in all attempts to define the power of legislative bodies over private corporations.

4th. That the agreement of the incorporators

that the State may "alter or repeal" their charter derives no support from such unconstitutional provision in a State constitution, and is therefore *nudum pactum*, as much so as it would have been had no such power been reserved.

5th. That the reservation by the State and the agreement by the incorporators, taken together, are repugnant to the Federal Constitution, and must be so held by the Courts so long as the maxim obtains that what cannot be done *directly* cannot be done *indirectly*.

Before leaving this branch of the question, it is proper to say that the foregoing conclusions do not deny to the State the exercise of its *police* power over private corporations. In respect to such power, private corporations stand upon the same level as natural persons, in respect to both obligation and immunity. Nor do they deny to the State the power to pass any laws which may have merely the effect to secure the safety of passengers and freights, or generally to enforce upon corporations an observance and performance of all their duties and obligations under their charters, or to prevent non-user or mis-user of their franchises. The States had this power before the power "to alter or repeal" was reserved, and they have it still. In the matter of legislation, they can go as far as they could have gone prior to the adoption of this reservation, but can go no further.

AS TO THE SECOND GROUND.

In Bartemyer *v.* Iowa, 18 Wallace, 129, the Supreme Court of the United States, speaking of the Fourteenth Amendment of the Federal Consti-

tution, has said: "It has become the fundamental law of this country that life, liberty and property (which include 'the pursuit of happiness') are sacred rights, which the Constitution of the United States guarantees to its humblest citizen against oppressive legislation, whether *national or local*, so that he cannot be deprived of them without *due process of law*."

The expression "due process of law" has been incorporated into all American constitutions, but it is no where defined. It was borrowed or inherited from *Magna Charta*. It is found in the provision of that instrument by which the Barons of England extorted from King John a royal pledge that the right of trial by jury should remain inviolate forever. The language of *Magna Charta* is: "*Nec super eum ibimus, nec super miltimus, nisi per legale judicium parium suorum, vel per legem terræ*" —(Neither will we pass upon him, or condemn him, but by the lawful judgment of his peers, *or by the law of the land*). Lord Coke says that these latter words, "*per legem terræ*" (by the law of the land), mean "*by due process of law*;" that is, without due presentment or indictment, and being brought in to answer thereto, by due process of the common law. "So that," says Judge Story, "this clause in effect affirms the right of trial according to the process and proceedings of the common law." Instead of the phrase, "by the law of the land," which was used in *Magna Charta*, the phrase employed by Lord Coke in defining its meaning has been substituted in American constitutions. It has been incorporated in the Federal Constitution "to protect the citizen against oppressive

legislation, either national or local;" and its meaning is that he shall not be deprived of his life, liberty or property *by the mere force and effect of an act of legislation*, but only by the process and judgment of the Courts, after a trial according to the course of the common law.

In Wynehamer *v.* The People, 13 N. Y. 392, Mr. Justice Comstock, speaking of the meaning of these constitutional phrases, "the law of the land" or "due process of law," said:

"No doubt, it seems to me, can be admitted of the meaning of these provisions. To say, as has been suggested, that 'the law of the land,' or 'due process of law,' may mean the very act of legislation which deprives the citizen of his rights, privileges or property, leads to a simple absurdity. The Constitution would then mean, that no person shall be deprived of his property or rights, unless the legislature shall pass a law to effectuate the wrong, and this would be throwing the restraint entirely away. The true interpretation of these constitutional phrases is, that where rights are acquired by the citizen under the existing law, there is no power in any branch of the government to take them away; but where they are held contrary to the existing law, or are forfeited by its violation, then they may be taken from him—*not by an act of the legislature*, but in the due administration of the law itself, before the judicial tribunals of the State. The cause or occasion for depriving the citizen of his supposed rights must be found in the law as it is, or, at least it cannot be *created* by a legislative act which *aims at their destruction*. Where rights of property are admitted to exist, the legislature cannot say they shall exist no longer; nor will it make any difference, *although a process and a tribunal* are appointed to execute the sentence. If this is the 'law of the land,' and 'due process of law,' within the meaning of the Constitution, *then the* legislature is omnipotent. It may, under the same interpretation, pass a law to take away liberty or life without a pre-existing cause, appointing judicial and executive agencies to execute its will. Property is placed, by the Constitution, in the category with liberty and life."

Speaking to the same question, in Norman *v.* Hirst (5 Watts. & Serg, 193) Chief Justice Gibson, of Pennsylvania, said:

"What law? Undoubtedly a pre-existing rule of conduct, not an *ex post facto* rescript or decree made for the occasion. The design of the convention was to exclude *arbitrary power* from every branch of the government; and there would be no exclusion of it if such rescripts or decrees were to take effect *in the form of a statute*. The right of property has no foundation or security but the law; and when the legislature shall successfully attempt to overturn it, even in a single instance, the liberty of the citizen is no more."

And in case of Taylor *v.* Porter (4 Hill, 145) Chief Justice Bronsen, discussing this question, said:

"The words 'law of the land,' as here used, do not mean a *statute* passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the constitution into mere nonsense. * * * The meaning of the section, then, seems to be, that no member of the State shall be disfranchised of any of his rights and privileges, unless the matter be adjudged against him upon trial had, according to the course of the common law. It must be ascertained judicially that he has forfeited his privileges, or that some one else has a superior title to the property he possesses, before either of them can be taken from him. *It cannot be done by mere legislation.*"

Chancellor Kent says: The better and larger definition of *due process* of law, is, that it means law in its *regular course of administration through Courts of Justice.*" (2 Com. 13).

It is clear, then, that any act of legislation which, under the pretext of altering or repealing the charter would have the effect to deprive a private corporation of its property, would be unconstitutional and void. This brings me to the question as to what legislative acts will deprive a

private corporation of its property, and incidentally as to what constitutes the property of a private corporation, within the meaning of this constitutional provision. For the purposes of my argument, I shall, as I have done heretofore, take the case of a railroad corporation.

WHAT IS THE PROPERTY OF A CORPORATION.

That the right of way, the superstructure of ties and iron rails, engines, cars, shops, depots and stations of a railroad company are property, is a matter of common learning. There is another kind of property possessed by railroad companies, the existence and nature of which are not so well understood, to-wit: their privileges and franchises. The former, with the exception of the right of way, are corporeal hereditaments; the latter, including the right of way, are incorporeal hereditaments. The latter are derived from the government, and from that fact the popular or unprofessional mind has adopted the erroneous impression that the power of the legislature is greater in respect to them than in respect to corporeal property. "Franchise" is a word of large signification, and is defined to be 'a royal privilege in the hands of the subject.' Change the terms of the definition to suit the conditions of our forms of government, and a franchise is a governmental privilege granted to and vested in individuals. They do not belong to citizens generally, by common right, and who ever claims a right to exercise them must show a grant from the government. The principal franchises of a railroad corporation are, the right to be a corporation, the right to use the power of eminent domain, the right to construct and operate a rail-

road or highway, and the right to collect tolls of persons who travel over the road, or use it for the transportation of their property, or goods, from one place to another. These rights and privileges are valuable, in law, and when vested in corporations or natural persons, become property. Speaking of franchises, Chancellor Kent says:

"Another class of incorporeal hereditaments are franchises, being certain privileges conferred by grant from government, and vested in individuals. In England they are very numerous, and are understood to be royal privileges in the hands of the subject. *They contain an implied covenant on the part of government not to invade the rights vested*, and on the part of the grantors to execute the conditions and duties prescribed in the grant. Some of these franchises are presumed to be founded on a valuable consideration, and to involve public duties, and to be made for the public accommodation, and to be affected with a *jus publicum*, and they are necessarily *exclusive* in their character. The government *cannot resume at pleasure*, or do any act *to impair the grant*, without a *breach of contract*. The privilege of making a road, or establishing a ferry, and taking tolls for the use of the same, is a franchise, and the public have an interest in the same; and the owners of the franchise are liable to answer in damages, if they should refuse to transport an individual without any reasonable excuse, upon being paid or tendered the usual rate of fare. The obligation between the government and the owner of such franchises is mutual. * * * *An estate in such a franchise, and an estate in land, rest upon the same principle, being equally grants of a right or privilege for an adequate consideration.*"

Speaking to this question, in the Dartmouth College case, Mr. Justice Story said:

"In respect to franchises, whether corporate or not, which include a pernancy of profits, such as right of fishery, or to hold a ferry, a market or a fair, or to erect a turnpike, bank, or bridge, there is no pretence to say that grants of them are not *within the constitution*. Yet they may in point of fact be of no exchangeable value to the owners. They may

be worthless in the market. The truth, however, is, that all incorporeal hereditaments, whether they be immunities, dignities, offices, or *franchises*, or other rights, are deemed *valuable* in law. The owners have a legal *estate* and *property* in them, and legal remedies to support and recover them, in case of any injury, obstruction or disseizin of them. * * * In respect to *corporate franchises*, they are, properly speaking, *legal estates* vested in the corporation itself as soon as it is *in esse*. They are not mere naked powers granted to the corporation; *but powers coupled with an interest*. The property of the corporation rests upon the possession of its franchises; and whatever may be thought as to the corporators, it cannot be denied, *that the corporation itself has a legal interest in them*."

Let us contrast this logic with the logic of those who contend that under a reserved power "to alter or repeal" the legislature may take the property of railroad companies without compensation. Their argument is clearly stated by Senator Carpenter in his speech delivered at Ripon, Wisconsin, on the 16th of September, 1874, upon "the power of legislatures to govern corporations of their own creation." In answer to the claim of the railroad companies, that the legislature cannot alter their charters so as to prejudice their rights, property, and franchises, he said:

"The first, and fatal falacy, in the argument which railroad companies make in support of this proposition, is in assuming that corporations have *indestructible rights* like *natural* persons. The rights and privileges with which God has endowed every individual man, *he cannot part with by contract*, nor can they be wrested from him without a violation of natural justice, which is the basis of all law and the foundation of all rightful government. Corporations, as they are recognized by our laws, are creatures of man, and only of man. It is absurd to say that corporations have any natural rights; that is rights not derived from the law, *rights the law cannot take away*. Corporations are mere human contrivances, and so far as natural rights are concerned, as

subject to the power which created them as a house is subject to the will of its builder or owner. The power which creates a corporation is as absolute as the power of the potter over common clay. 'Hath not the potter power over the clay, of the same lump, to make one vessel unto honor and another unto dishonor?' The Scripture sustains the 'Potter law!!' (The *pun* is better than the logic.) * * * God gives and may take away the life of a man. *The law gives and may take away the existence of a corporation.* * * * The State takes the land from its citizens for the purpose of constructing thereon an iron rail highway; and creates a corporation to hold the title, build the road, and operate it *as the agent of the State.* It is the State which takes, and the State which is all the time holding the land; the corporation is the *mere agent* or *medium* through which the State acts in taking and holding the land, and in operating the railroad. Every act performed by the company, from the first breaking of ground, for the construction of the road, to the collection of tolls on operated trains, *is an act performed by the company for the State*, performed as the *agent* of the State, by express authority from the State—*authority which the State may at any time recall.*"

Such is the monstrous doctrine to which the advocates of this legislative power are compelled to resort to sustain it. Yet it is apparent that they cannot stop short of the extreme to which they go without failing to sustain the power. The argument is, that the corporation possesses a mere naked power, in the premises, which it exercises *exclusively* for the benefit of the State. Undoubtedly, if such be the character of the power, the State may revoke it at any time. But such is not its character—the power is coupled with an interest vested in the corporation—the power is to be exercised by the company in aid of a right vested in it by the State. That, where such are the conditions, the power is irrevocable, is familiar law.

The argument was not new with Senator

Carpenter. It was made in the Dartmouth College case, and its fallacy was exposed by Mr. Justice Story, in the following language:

"In order to get rid of the legal difficulty of these franchises being considered as valuable hereditaments or *property*, the counsel for defendant are driven to contend that the corporators or trustees are *mere agents* of the corporation, in whom no beneficial interest subsists; and so nothing but a naked power is touched by removing them from the trust; and then to hold the corporation itself a mere ideal being, capable indeed of holding property or franchises, *but having no interest in them* which can be the subject of contract. *Neither of these positions is admissible.* The former has already been sufficiently considered and the latter may be disposed of in a few words. *The corporators are not mere agents, but have vested rights in their charter as corporators.*"

Instead of the relation of a railroad company to the property and franchises in its possession, being that of a naked agent, as claimed by Senator Carpenter, it is analagous to the case of an owner holding his estate charged with a servitude in favor of the State. The State has a right to use it, upon the terms specified in the charter, and has no greater or other interest in it. A corporation is not the mere creature of the State, holding its existence and its rights at the mere will and pleasure of the State. It has the same power, within the limits of its charter, to acquire and hold property to *its own use* that a natural person has. It has the same right to the years allotted to it by its charter, that a natural person has to his three score and ten. For its property and its existence it is entitled to the same protection, under the constitution, which is accorded to a natural person; and can, no more than a natural person, trade away or divest itself of that protection.

DEPRIVATION OF PROPERTY.

Having shown that corporate franchises are property within the meaning of the Federal Constitution, the next question to be considered is,—what acts on the part of a legislature will amount to a deprivation of property within the meaning of the constitutional provision in question.

Suppose the legislature should repeal the charter of a railroad corporation, would the repeal deprive the corporation of its property in the sense of the Federal Constitution?

Instead of repealing its charter, suppose the legislature should alter it by reducing the maximum rate of toll established therein, would the change have the effect to deprive the corporation of its property in the sense of the Federal Constitution?

The only rational answer that can be given to either of these questions is in the affirmative.

The theory of the English government is, that parliament is omnipotent, and hence it has been held in England, that the charter of a private corporation may be repealed, or in other words, the corporation dissolved, by a mere act of parliament. Yet the exercise of a power, so repugnant to everybody's sense of natural right, has only twice found a place in the history of England; one was the suppression of the Order of Templars in the time of Edward the Second, and of the religious houses in the time of Henry the Eighth. When, in 1783, it was proposed by act of parliament to remodel the charter of the East India Company, the measure was strenuously opposed by Lord Thurlow and Mr. Pitt. The former denounced the measure as being not only a violation of the charter of the

Company, but a violation of the Constitution of England. He characterized it as "an atrocious violation of private property, *which cut every Englishman to the bone.*" (Angell & Ames on Corporations, § 767.)

Would Lord Thurlow have thought it a less atrocious violation of private property, had it been provided for by an act of parliament older than the charter of the Company, or in the charter itself? Would the bill, in that case, have been, in his judgment, less subversive of the fundamental law of England? Would the character of the bill have been intrinsically changed, had it been previously provided by an act of parliament, that this atrocious violation of private property might be perpetrated? It is believed that no previous act of parliament, to that effect, would have lessened, in his judgment, the atrocity of the bill, or rendered the proposed violation of private property less likely to "cut every Englishman to the bone." The idea that the atrocity of such a violation of private property is mitigated, or wholly removed, by a prearrangement to that effect, has been left to find development in American statemanship, where the written law forbids what the unwritten law of England permits, but what, nevertheless, an Englishman's love of natural justice forbids him to tolerate.

A like view of the nature of such a measure was taken in France, in 1786, in the discussion which arose on the new charter then recently granted to the French East India Company. Those opposed to the charter denied the legal existence of the Company, on the ground that the king had

been surprised into making the grant; that the grant was not yet perfected by the issuing of letters patent, nor duly registered by the parliaments; and that it might and ought to be suppressed, as an illegal grant of exclusive privileges, contrary to the true principles of commercial philosophy.

On the part of the Company, it was contended that their grant was irrevocable; that it was but a renewal and confirmation of the charter of the old Company, which had been suspended in 1769, in consequence of the immense losses of capital sustained in the calamitous war of 1756 (but which suspension was, at the time, solemnly protested against by the parliament of Paris as illegal); that their new grant might still be perfected by letters patent, which the faith of the king was pledged to issue; and that the privileges thus granted to them were irrevocably vested as a *right of property*, of which they could not be *deprived* by any authority in the kingdom. But it was agreed by the contending parties that if the charter had *regularly* issued according to the forms of the French law, it was *irrevocable*, unless forfeited for nonuser or misuser (4 Wheaton, 713—note.)

The same wholesome doctrine prevailed in this country until the reservation of the atrocious power to "alter or repeal." In Territ *v.* Taylor, (9 Cranch, 43), the Supreme Court of the United States said :

"A private corporation created by the legislature, may lose its franchises by a misuser or nonuser of them ; and they may be resumed by the government under a *judicial judgment* upon a *quo warranto* to ascertain and inforce the forfeiture. This is the common law of the land, and is a tacit condition annexed to the creation of every such corporation. * * *

But that the legislature can repeal statutes creating private corporations, or confirming to them *property* already acquired under the faith of previous laws, and by such repeal can vest the property of such corporations exclusively in the State, or dispose of the same to such purposes as they please, without the consent or default of the corporators, *we are not prepared to admit;* and we think ourselves standing upon the *principles of natural justice*, upon the *fundamental laws* of every *free* government, upon the spirit and letter of the Constitution of the United States, and upon the decisions of most respectable judicial tribunals, in resisting such a doctrine."

These authorities proceed upon the idea that the revocation or repeal of a private charter is a divisture of property. That it is, is obvious. Upon the repeal of the charter, the corporation ceases to exist, and there being no successor to take, at common law, the property escheates and vests in the State; and if the State should provide for its distribution among the creditors until their claims are satisfied, and a distribution of the surplus, if any, among the stockholders, the divesture would be no less complete. A State has no right, by a mere act of legislation, to take the property of A and give it to B, even in payment of a debt, nor to distribute it among parties who may have an equitable interest in it, and either is as complete a divesture as if the State should appropriate the property to its exclusive use.

It is no less clear that a reduction of the maximum rates of toll would be also a divesture. In that case the State does not resume the entire franchise, which it has granted, and which has been made valuable by an expenditure of the money of the grantees, but it resumes a part of it, and to that extent lessens its value to the

grantees and their estate therein. Its effect is the same as where an interest or estate less than the whole is taken under the power of eminent domain; a less than the whole can no more be taken without compensation than the whole.

That by such acts the corporation would be "deprived" of its property within the meaning of the constitutional provision is deducible from every definition of property to be found in the books. "The third absolute right of every Englishman," says Blackstone, "is that of property, which consists in the *free use*, enjoyment and disposal of all his acquisitions, without any *control* or *diminution*, save only by the laws of the land.' (1 Com. 138). "The exclusive right," says Chancellor Kent "of *using* and transferring property, follows as a natural consequence from the perception and admission of the right itself. * * * The power of *alienation* of *property* is a necessary incident to the right, and was dictated by mutual convenince and mutual wants." (2 Com. 320, 326). Property does not consist merely of ownership and possession of corporeal or incorporeal things; it includes the right to use, to control, and to dispose of. Without these rights property would be valueless; indeed, these rights are property—more so than the thing itself. Whatever act, then, on the part of the legislature would have the effect to deprive the owner of the right to use, or control, or dispose of his property, would deprive him of his property, although the possession of it be allowed to remain with him.

In the case of Wynehamer *v.* the People, (13 N. Y., 378), Mr. Justice Selden said:

"*Property is the right of any person to possess, use, enjoy and dispose of a thing.* The term, though frequently applied to the thing itself, in strictness means only the rights of the owner in relation to it. A man may be deprived of his property in a chattel, therefore, without its being seized, or physically destroyed, or taken from his possession. Whatever subverts his rights in regard to it *annihilates his property in it.*"

An illustration of these principles is found in the so-called prohibitory liquor laws of some of the States. The State of New York passed a law whereby it was declared unlawful to sell, except for mechanical, chemical, medicinal, and sacramental purposes, intoxicating liquors, or to keep them for sale, or with intent to sell. Intoxicating liquors were declared a public nuisance, and all legal protection was withdrawn from them. If the owner sold them he could maintain no action for the price; and if they were taken from him by force or fraud he could maintain no action for their recovery. This law was not restricted in its operation to liquors which might thereafter be manufactured or imported, but operated upon liquors already manufactured or imported at the time the law took effect. It had the effect to destroy the right to *use, control,* and *dispose of* what, by the law of the land, was property *in esse* at the time the law was passed. It had the effect to render valueless property then in the possession of the owners, upon which they had expended their labor and skill, or in which they had invested their money. The Court of Appeals declared the Act to be unconstitutional, because it deprived the owner of his property *without due process of law.* The Court, by Judge Comstock, said:

"The statute under consideration, without reference to its provisions for the seizure and physical destruction of intoxicating liquors, *by force of its prohibitions alone*, sweeps them from the commerce of the State, and thus annihilates the quality of sale, which makes them valuable to the owner. *This is destructive of the notion of property.* I need, perhaps, take no further notice of their qualified vendibility for the sacrament, and the other special uses named in the Act. These are only the occasional and incidental uses of the article. It is the general and primary *use* which is aimed at. It is the mass of property which is struck down; and the possible conservation of an extremely insignificant portion cannot change the character of the law. No ingenuous advocate of the law will deny that its great characteristic is *prohibition*, intended to turn back from the channels of commerce important masses of property, and thus, by *suppressing the use*, prevent the abuse. To regard the act in any other light, would be a fraud upon its entire policy, and upon the views and motives in which it must be supposed to have had its origin. And in order to a full view of the spirit and intent of the law, to simple prohibition we must add its penalties and its other connected and dependent clauses, the whole forming one scheme, and all tending with fatal accuracy to the destruction of property in intoxicating liquors within this State.

"Unless, therefore, the right of property in liquors is denied altogether—and this has never been done—or unless they can be distinguished from every other species of property—and this has not been attempted—the act cannot stand consistently with the Constitution. The provisions of the Constitution should receive a beneficent and liberal interpretation, where the *fundamental rights* of the citizen are concerned. But, in the case before us, its plain and obvious meaning is enough. 'No person can be deprived of his property without due process of law' by the legislature or any other power of the government. *When the law annihilates the value of property, and strips it of its attributes, by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation*, and certainly within the spirit of a constitutional provision intended expressly to shield private rights from the exercise of arbitrary power." (13 N. Y. 397.)

Substantially the same view has been taken by the Supreme Court of the United States in a case which involved an exercise of the power of eminent domain. That any taking of private property for public use, which is prohibited by the constitutional restriction upon the power of eminent domain, would be a deprivation of property within the meaning of the constitutional provision in hand, no one will deny.

The case referred to was trespass on the case for overflowing six hundred and forty acres of the land of the plaintiff. The flowage was caused by a dam erected by the defendant, under, as claimed, legislative authority; and the principal question was, whether the flowage was a *taking* of private property for public use within the constitutional restriction placed upon the power of eminent domain; and, speaking to that question, the Court said:

"It would be a very curious and unsatisfactory result if, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators, as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the *absolute conversion* of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public

good, which had no warrant in the laws or practices of of our ancestors."

(Pumpelly *v.* Green Bay Company, 13 Wallace, 177.)

Authorities might be multiplied to show that the "taking" intended to be prohibited by the constitutional restriction upon the power of eminent domain, or the "depriving" intended to be inhibited by the constitutional restriction under consideration, includes acts which do not absolutely convert it, but which merely destroy the essential attributes of property, to-wit: use, control and sale; but the cases already cited are deemed sufficient. Under the rules declared in the cases cited the repeal of the charter of a private corporation would amount to an absolute conversion of all the incorporeal hereditaments of the corporation, and render useless its corporeal hereditaments; and an act reducing the maximum rates of toll would, *pro tanto* amount to a conversion of its franchise to collect and enjoy tolls; and such are my conclusions upon this branch of the principal question.

In closing this discussion, I cannot refrain from quoting a passage from Sir William Blackstone, written more than a century ago. He said:

"So great is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for *the general good of the whole community.* If a new road, for instance, were to be made through the grounds of a private person, it might, perhaps, be extensively beneficial to the public, but the law permits no man, or set of men, to do this without the consent of the owner of the land. In vain may it be urged that the good of the individual ought to yield to that of the community, for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it

be expedient or no. *Besides, the public good is in nothing more essentially interested than in the protection of every individual's private rights, as modeled by the municipal law.*"

So inestimable has this, and cognate principles of the common law, been considered by the American people, that they have caused them to be expressly incorporated into their Constitutions as *inalienable rights*—rights of which they cannot be deprived, except as a punishment for crime, by any department of the government, or by any act of their own, and it will be strange indeed if they have deliberately inserted in their Constitutions a clause which removes these safe grounds as to millions of property and leaves it exposed to the wanton assaults of legislative bodies. It will be strange indeed if they have "blown hot and cold" upon the inviolability of contracts and property—have said in one breath: "the obligation of contracts shall not be impaired," "private property shall not be taken for public use without just compensation," and "no person shall be deprived of his property without due process of law;" and in another breath have said: "the legislature may, in certain cases, impair the obligation of contracts," "private property, in certain cases, may be taken for public use without compensation," and "certain persons may be deprived of their property without due process of law." If such proves to be the case, it will be better for them to abandon their Constitutions and return to the more beneficent and consistent rules of the common law.

I am of the opinion:

1st. That a legislature can pass no law which will impair the obligations of a charter which it

has granted to a private corporation, even where the constitution, or a general statute, provides that the charters of private corporations may be "altered from time to time or repealed."

2d. That a law, repealing the charter of a private corporation or reducing the maximum rates of toll therein provided for, impairs the obligation of the charter.

3d. That the only way by which a State can resume corporate franchises is to resort to the power of eminent domain, which can be exercised only upon making "just compensation."

Respectfully yours,

H. S. Brown

S. W. SANDERSON,

Counsel for the Central Pacific R. R. Co.

94-164

SUPREME COURT

OF THE

UNITED STATES.

WILLIAM FREDERICK PIEK, HENRY R. PIERSON, MOSES TAYLOR, THE FARMERS' LOAN AND TRUST COMPANY, AND THE UNION TRUST COMPANY,

Appellants,

vs.

THE CHICAGO & NORTHWESTERN RAILWAY COMPANY, GEORGE H. PAUL, JOSEPH H. OSBORN, JOHN W. HOYT, AND A. SCOTT SLOAN,

Respondents.

DEWITT C. LAWRENCE, CYRUS J. LAWRENCE, DARIUS W. LAWRENCE, WILLIAM G. WILEY, AND WAITE TALCOTT,

Appellants,

vs.

GEORGE H. PAUL, JOSEPH H. OSBORN, JOHN W. HOYT, A. SCOTT SLOAN, AND THE CHICAGO & NORTHWESTERN RAILWAY COMPANY,

Respondents.

OCTOBER TERM, 1875.

L. S. DIXON,

Of Counsel for the Defendants,

The Railroad Commissioners,

And the Attorney General of the State of Wisconsin.

SENTINEL COMPANY, MILWAUKEE.

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Respondents.

These two appeals present the same questions, and may properly be discussed and considered together as

one action. The suit first entitled is by the plaintiffs *Piek*, *Pierson* and *Taylor*, as the holders of sundry interest or coupon bonds issued or guaranteed by the defendant, *The Chicago and Northwestern Railway Company*.

The plaintiff, *The Farmers' Loan and Trust Company*, sues as the representative of the holders of bonds secured by two mortgages executed to it as trustee, by the defendant railway company, which mortgages were executed and bonds issued respectively April 1, 1871, and June 1, 1871. The mortgage dated April 1, 1871, is of that part of the railway company's road extending from the city of Madison, in the state of Wisconsin, to a junction, near the city of La Crosse, in said state, with the La Crosse, Trempealeau and Prescott Railroad, a distance of about 126 miles, and given to secure, in the aggregate, the sum of $3,150,000 bonds, known as the "Madison Extension First Mortgage Sinking Fund Bonds." The mortgage dated June 1, 1871, is of that part of the railway company's road constructed from the town of Fort Howard, in Wisconsin, northerly to the state line, being about 120 miles, to a junction with the line of railroad in Michigan owned by the defendant railway company, and given to secure $2,700,000 bonds known as "Menominee Extension First Mortgage Sinking Fund Gold Bonds."

The plaintiff, *The Union Trust Company*, sues as the representative of the holders of bonds secured by a mortgage executed to it as trustee by the railway, on the 30th day of November, 1872. This mortgage is of all the railway company's lines of road in several states, and was given to secure what are known as the "General Consolidated Gold Bonds" of the railway company, amounting in all to $48,000,000, only a small portion of which have as yet been issued.

The plaintiff *Piek* is the holder of $12,000 "Madison Extension" bonds, $120,000 "Menominee Extension" bonds, and $217,000 "General Consolidated" bonds.

The plaintiff *Pierson* holds $25,000 "Menominee Extension" bonds.

The plaintiff *Taylor* holds $101,000 of the bonds of the La Crosse, Trempealeau and Prescott Railroad Company, a corporation created by act of the legislature of the state of Wisconsin, approved March 6, 1857, the payment of which bonds has been guaranteed by the defendant, *The Chicago and Northwestern Railway Company*, under authority of an act of the Legislature of the same state, approved March 10th, 1871. *Taylor* is also the holder and owner of bonds of the Winona & St. Peter Railroad Company to the amount of $115,000, the payment of which is alleged to have been guaranteed by the defendant railway company under and by virtue of the same act of March 10th, 1871. In addition to these *Taylor* holds and owns $157,000 of the "Consolidated Sinking-fund Bonds" issued by the defendant railway company, and bearing date February 1st, 1865.

The bill contains a history of *The Chicago & Northwestern Railway Company* and of the various corporations out of which it has arisen, and with which it has been consolidated or become connected in business, since its inception in the charter of The Madison and Beloit Railroad Company, passed in 1848; and appended to the bill, in the form of exhibits, are copies of all the acts of the Legislature of Wisconsin pertaining to corporate rights and franchises of the company. Active operations on the part of the company or its predecessors, in the way of building roads and incurring indebtedness, were commenced about the year 1855 or 1856.

The object of the bill is to restrain by injunction the public authorities of the state of Wisconsin from execut-

ing the provisions of an act of the legislature of said state, passed and approved March 11, 1874, to take effect April 28, 1874. The act is popularly known as the "Potter Law," and is set forth at length in the bill of complaint, on pages 16 to 21 of the printed record.

The defendants, *Paul*, *Osborn* and *Hoyt*, are the railroad commissioners of the State of Wisconsin, appointed by the governor of the state under and in pursuance of the provisions of the act, and who are charged by the act with the performance of certain important functions made necessary by it.

The defendant, *A. Scott Sloan*, is the attorney-general of the state, upon whom, by the constitution and laws thereof, devolves the duty of representing the state and its people, in their sovereign capacity, in all judicial proceedings of a public nature, and the obligation of seeing that the laws of the state are judicially enforced.

The act of the legislature complained of, and against which relief by injunction is thus sought, is an act regulating the rates and charges at which passengers and freights are to be carried by railroad companies in the state of Wisconsin, and reducing such rates and charges in some particulars below those fixed by the railway companies themselves, prior to the passage of the act, and when no such statutory regulations existed.

The ground of objection to the act, is, that it so reduces the prices at which the defendant railway company is required to transport passengers and freights, that the income and revenues of the company, after defraying the necessary expenses of operating and maintaining its road, will be insufficient to pay the interest upon the bonds held and owned by the plaintiffs and those whom the plaintiffs represent. This is an apprehended grievance merely, and not one which was or could be known at the time of filing the bill as actually

existing, or which would exist or certainly follow as one of the consequences of enforcing the act of the legislature complained of.

The theory of the bill is that the several acts of the legislature of the state of Wisconsin, under and by virtue of which the defendant railway company has its existence, and from and through which it derives all its corporate rights, franchises and privileges, became and were contracts between the state and the railway company, protected by the constitution of the United States against change or modification by the state; and that the act in question contravenes that clause of the constitution and is void on that ground. The bill charges that the legislature of Wisconsin had no constitutional power to pass the act, and that it is without any binding force upon the railway company.

A further theory of the bill is, that, although the act may be valid and obligatory as against the railway company, yet it is unconstitutional and void as against the plaintiffs, who are creditors of the company, because the effect of it is, or may be, to diminish or destroy the ability of their debtor to pay the debts due to them. This, it is charged, is a violation of the obligation of the contracts between the plaintiffs and the railway company, within the meaning of the clause of the federal constitution above referred to.

The bill likewise states other and minor grounds of objection to the validity of the act, some of which may hereafter be noticed, but it is conceived that the action of the complainants must stand or fall according as the two foregoing principal propositions upon which it is founded may or may not be found to be correct. If either be found correct the action may be maintained. If both are incorrect it must fail.

The action secondly above entitled is like the first, except that it is instituted by the plaintiffs as holders

and owners of stock in the railway company defendant. These stockholders complain in like manner, and upon like grounds, that the act in question is invalid. They say it violates the charter of the company as a contract between the state and the company, and likewise that it violates the obligation of the contracts entered into between them and the company when they became stockholders, by diminishing or taking away the ability of the company to pay expected dividends or profits upon their stock, thus rendering their stock less valuable, or, by possibility, reducing it to a nominal value.

Such are the chief questions presented on these appeals, of which the first, namely, as to the contract relation between the state and the railway company, is the primary and most important one; for if it be found that no such relation exists, then it is believed that the court will experience very little difficulty in disposing of the second question.

I.

Section 1 of Art. XI of the constitution of the State of Wisconsin, adopted prior to the passage of any of the laws under which the railroad company was incorporated, and holds its franchises and privileges, and which was in force as part of the fundamental law of the state at the time when those laws were severally enacted, declares: "Corporations without banking powers or privileges may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. All general laws or special acts enacted under the provisions of

this section, may be altered or repealed at any time after their passage."

We propose first to consider the effect of this reserved power of the state, in the light of authority. Afterwards it will be examined on principle. The question is not a new one in this court, nor in the courts of Wisconsin, as well as the courts of several of the states.

In *Wisconsin*, it was judicially considered and determined years before any of the contracts relied upon by the complainants were entered into, and a considerable time anterior to the building of any of the roads now owned and operated by the defendant railway company, and anterior to the incurring of any indebtedness by that company, or by any of its predecessors.

As early as the June term, 1854, the Supreme Court of the state held, in *The Madison, Watertown and Milwaukee Plankroad Company v. Reynolds*, 3 *Wis.*, 287, 293-6, that a subsequent act of the legislature restricting the amount of tolls which the Plankroad Company, plaintiff in that case, was entitled to charge and receive under its original charter, was valid, obligatory upon the company. The question in that case arose, not upon the language of the constitution, but upon a reservation of power contained in the charter, which was one granted by the territory of Wisconsin before the formation of a state government. The reservation was in these words: "This act may be amended by any future legislature of the territory or state of Wisconsin."

Again, at the same term of court, in *Pratt v. Brown*, 3 *Wis.*, 603, 611-13, the court had occasion to consider the reservation as contained in the constitution, and used the following explicit language: "The doctrine that a charter of incorporation, conferring franchises upon a company or individual, was in the nature of a grant, and hence protected from encroachment or attack by the shield of the federal constitution, which

prohibits the states from passing laws impairing the obligation of contracts, was established, after elaborate argument and on full consideration, by the Supreme Court of the United States in the Dartmouth College case. This doctrine has, since that decision, been generally acquiesced in by nearly, if not all the state courts in the Union. It is competent, nevertheless, for each state, by constitutional regulation or specific legislative enactment, to reserve the power to modify or repeal all such acts of incorporation.

"Where the power of modification or repeal is reserved, either in the one mode or the other, it is obvious that the grantees must rely, for the perpetuity and integrity of the franchise granted to them, solely upon the faith of the sovereign grantor. Hence, since the decision of the Dartmouth College case, some of the states, and our own among the number, have, by constitutional provision, reserved to their legislatures the right of modification or repeal of all special acts of incorporation; and all such corporations now rest upon the faith of the state, taking care to deserve its favor, or command its justice, by observing strictly the limit of their powers, and accomplishing by all legitimate means the objects of their creation. * * * But is it not obvious that such corporations may hold and exercise such power only at the will of the legislature, circumscribed either by fundamental law, or by the particular act of incorporation? Sometimes the grant of such franchises is in perpetuity; sometimes for a given number of years, and sometimes during the pleasure of the sovereign grantor. But by whatever mode, or at whatever time, the franchise is determinable, it is nevertheless dependent upon the sovereign power, at its will, constitutionally expressed. While the corporate existence and franchises remain, all acts done in conformity therewith are lawful; but on their extinction,

either by lapse of time, or by the soverign mandate, the acts which were before lawful become unlawful, and the powers and franchises are resumed by the government. The latter in effect declares that the public good or necessity no longer requires the exercise of those powers, and the agency of the corporation through which they have been exercised is thenceforth dispensed with."

The same doctrine was distinctly recognized in *Nazro v. Merchant's Mutual Insurance Company*, 14 *Wis.*, 295, 299, decided in 1861.

And again, the reason for the constitutional reservation and the effect of it were similarly explained and affirmed in *Kenosha, Rockford and Rock Island Railroad Company v. Marsh*, 17 *Wis.*, *p.* 16, decided in 1863.

In *Whiting v. The Sheboygan & Fond du Lac Railroad Company*, 25 *Wis.*, 197, 198, 202, decided in 1870, the court say that "under the principles announced in the Dartmouth College case, and in the numerous cases which have followed it in the same court, and by the authority of which the courts of all the states are bound, this power of the state to regulate and control the franchise and fix the amount of the tolls has frequently been wholly lost. * * * But be this matter as it may in other states, the question can never arise in this state. Our people, by a most wise and beneficent provision in their constitution, have perpetually reserved the power to the legislature to alter or repeal all charters or acts of incorporation at any time after their passage. * * * As yet, we believe, the power has never been exercised with respect to any railroad company organized in this state, and possibly it may never be. It is valuable, however, as a check upon the rapacity which these corporations sometimes exhibit, and the time may come when the legislature will be imperiously required to exert it; but when it does, if

ever, it will not be to deprive the corporation or its stockholders of their legitimate rights, but to correct abuses and save the rights of the people. The legislature will not reduce the tolls or rates to an unreasonably low figure, or so as to disappoint the just expectations of the owners of stock."

In *State v. Milwaukee Gas Light Company*, 29 *Wis.*, 461, 462, decided in 1872, speaking of an exclusive privilege which had been conferred upon the Gas Light Company to supply the city with gas, the court say: "Of course, the whole matter, under our constitution, is under the control of the legislature, which can take away from the defendant this exclusive privilege whenever it sees fit to do so." Again: "The legislature retains control over such charters in this state, and has the power to take away any exclusive privilege or franchise which it may have improvidently granted."

Again in 1874, the extent of the reserved power was involved and under consideration in *The West Wisconsin Railroad Co. v. The Board of Supervisors of Trempealeau County*, 35 Wis. 257, and the unqualified right of the legislature to alter or repeal any and every corporate franchise and privilege, was broadly asserted and affirmed.

And lastly, in *The Attorney General v. Railroad*, 35 Wis. 425, in an opinion remarkable for its learning and ability, this question was once more fully considered with respect to the very act here complained of, and the act was determined by the court to be a proper and valid exercise of the reserved power contained in the constitution. The court (p. 576) say: "The reserved power in our constitution is a positive provision entering into all charters under it, and must be construed as written. We cannot construe away its meaning, or hold it to mean something else, which we or others might consider wiser or better. We are bound, in our con-

struction of it, by the very words used. We refer to a large number of cases on this point, collated in *Buffham v. City of Racine*, 26 Wis. 451 to 465. The power is limited by its own words only. Any limitation of it must come from those words. And we must be guided in our construction of the words used, if the words will admit of it, by the purpose of the provision, to do away in this state, the rule in the Dartmouth College case, so far as it relates to charters of private corporations. The power to repeal can bear but one construction; nor, if its use, the word has but one meaning. The power to alter depends on the meaning of the word alter. To alter is to make different, without destroying identity (Crabb); to vary without entire change (Webster and Imp. Dict.) A corporate charter of one kind cannot be altered to a charter of an entirely different kind. But a corporate charter may be altered so as to make it different in detail, so long as the general identity of he corporation remains; so that it is varied without entire change. This is the obvious meaning to lawyer or layman. Arguments *ab inconvenienti* cannot weigh against the manifest meaning of the word used; they may go to impeach the wisdom of the power, but not to impair its import."

Such is, and from the earliest period of time has been, the clear and uniform course of opinion and decision of the Supreme Court of Wisconsin, by which, long before the bonds and stocks in question were issued, this clause of the constitution of the state had received a well established and well known judicial construction. The clause was itself fair notice, beforehand, of the public right to alter or repeal at discretion. The judicial decisions of the highest court of the state made such notice still more clear and emphatic. All were purchasers of the stocks and bonds with notice.

It is not claimed, and cannot be, that this clause of

the state constitution violates or in any manner conflicts with any article or provision of the federal constitution; and where such is the case, nothing is better settled by the decisions of this court than that this court will adopt and be governed by the construction given by the court of the state to its own *written* constitution. The same rule extends, under the same circumstances, to the judicial construction given by the state court to a state statute. It is the function of the state court, and not of this court, in all such cases, to interpret and expound its constitution and laws, and this court receives them as thus interpreted and expounded, and gives them the same force and effect which they have in the state, or before the judicial tribunals of the state. It is respectfully submitted, therefore, that the interpretation given by the court of Wisconsin to the provision of the written constitution of the state here under consideration, must be followed by this court, and is decisive of this question.

In this court the same construction has been given to the same words, and the scope and operation of the reserved power has been held the same, whether contained in a special act by which a corporation has been created, a general law of the state applicable to all future acts of incorporation, unless specially excepted, or, as in this instance, in the constitution of the state by which the legislature is bound, and under which no unalterable or irrepealable charter can be granted. The question has been several times before this court, and always with one result. The exercise of the reserved power has invariably been sustained.

It is a historical fact, familiar to all who have given the subject any attention and study, that one principal object of reserving the power to alter or repeal is, and always has been, so far as it concerns railroad companies, turnpike, plankroad or ferry companies, and other like corporations performing public or *quasi* public func-

tions, and upon which certain public rights and franchises are conferred, to enable the legislature at any future time to regulate and restrict the tolls and fares to be demanded by such corporations. The reserved power is and ever has been regarded by the state and the people, with respect to such corporations, as chiefly valuable because it gave to the legislature this right; and accordingly we find this court, in *Olcott v. The Supervisors*, 16 Wallace, 678, 694, which was a Wisconsin case, and where the court was speaking of the very clause of the state constitution now involved, using the following language: "That the legislature of Wisconsin may alter or repeal the charter granted to the Sheboygan and Fond du Lac Railroad Company, is certain. This is a power reserved by the constitution. The railroad can, therefore, be controlled and regulated by the state. Its use can be defined; its tolls and rates for transportation may be limited."

In *Pennsylvania College Cases*, 13 Wallace, 119, 230, the operation and effect of the reservation is thus stated by the court: "Cases often arise where the Legislature, in granting an act of incorporation for a private purpose, either make the duration of the charter conditional, or reserve to the state the power to alter, modify or repeal the same at pleasure. Where such a provision is incorporated in the charter, it is clear that it qualifies the grant, and that the subsequent exercise of the reserved power cannot be regarded as an act within the prohibition of the constitution. Such a power also—that is the power to alter, modify, or repeal an act of incorporation—is frequently reserved to the state by a general law applicable to all acts of incorporation, or to certain clauses of the same, as the case may be; in which case it is equally clear that the power may be exercised whenever it appears that the act of incorporation is one which falls within the reservation, and that

the charter was granted subsequent to the passage of the general law, even though the charter contains no such condition, nor any allusion to such a reservation. Reservations in such a charter, it is admitted, may be made, and it is also conceded that where they exist the exercise of the power reserved by a subsequent legislature does not impair the obligation of the contract created by the original act of incorporation."

Tomlinson v. Jessup, 15 Wallace, 454, 458-9, affirms the same doctrine. The court say: "The object of the reservation, and of similar reservations in other charters, is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise if the public interest should at any time require such interference. It is a provision intended to preserve the state control over its contract with the corporators, which, without that provision, would be irrepealable and protected from any measures affecting its obligation. The reservation affects the entire relation between the state and the corporation, and places under legislative control all rights, privileges and immunities derived by its charter directly from the state."

Other instances of the affirmance by this court of the reserved power will be found in the following cases:

Sherman v. Smith, 1 *Black.*, 587.
Miller v. The State, 15 *Wallace*, 478.
Holyoke Company v. Lyman, *ib.*, 500.

In *The Binghamton Bridge*, 3 Wallace, 51, 75, the rule of construction, as between the state and the corporation, is thus laid down by the court: "In the case of the Charles River bridge, 11 Peters, 544, the rules of construction known to the English common law were adopted and applied in the interpretation of legislative grants, and the principle was recognized, that

charters are to be construed most favorably to the state, and that in grants by the public nothing passes by implication. This court has repeatedly since re-asserted the same doctrine; and the decisions of the several states are nearly all the same way. The principle is this: that all rights which are asserted against the state must be clearly defined, and not raised by inference or presumption; and if the charter is silent about a power it does not exist. If, on fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the state; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the state."

Again, in *Home of the Friendless v. Rouse*, 3 Wallace, 430, 437, where the question was as to whether there was a contract between the state and the corporation. the court say: "It is true that legislative contracts are to be construed most favorably to the state if, on a fair consideration to be given the charter, any reasonable doubt arises as to their interpretation: but as every contract is to be construed to accomplish the intention of the parties to it, if there is no ambiguity about it, and this intention clearly appears on reading the instrument, it is as much the duty of the court to uphold and sustain it, as if it were a contract between private parties."

The observations of the court, 13 Wallace 498 and 522, that the power to alter is not without limit, are certainly correct, and not susceptible of mistake or misapplication. "Such a reservation, it is held, will not warrant the legislature in passing laws to change the control of an institution from one religious sect to another, or to divert the fund of the donors to any new use inconsistent with the intent and purpose of the charter, or to

compel subscribers to the stock, whose subscription is conditional, to waive any of the conditions of their contract." This is a limitation implied from the word alter, and dependent on the meaning of that word. It is the very same limitation recognized by the court of Wisconsin in one of the extracts above made. The legislature cannot under the reserved power change a corporation of one kind into one of another kind, nor change the substantial purposes of it, and for which it was created and its funds contributed by the corporators or donors, for this would not be alteration. It cannot, without the assent of the stockholders or corporators, change a railway corporation into one for the manufacture of agricultural implements, nor an incorporated banking company into one for doing the business of insurance. Alteration preserves identity both in kind and purpose. Change destroys identity, although the thing substituted may be of the same general kind "We *change* a thing by putting another in its place; we *alter* a thing by making it different from what it was before; we vary it by *altering* it in different manners and at different times. We *change* our clothes whenever we put on others; the tailor *alters* clothes which are found not to fit; and he *varies* the fashion of making them whenever he makes new. A thing is *changed* without *altering* its kind; it is *altered* without destroying its identity; and it is *varied* without destroying the similarity. We *change* our habitation, but it still remains a habitation; we *alter* our house, but it still remains the same house; we *vary* the manner of painting and decoration, but it may strongly resemble the manner in which it has been before executed."—Crabb's English Synonymes.

The controversy reduces itself, therefore, to the meaning of a single word. Whatever is within the scope of the authority conferred or retained by that word, that the legislature may freely do whenever the

public necessity or convenience requires, and of which necessity or convenience the legislature alone are to judge. Whatever is beyond the scope of such authority, of course, the legislature cannot do, and all such legislative action taking place under pretense of being an exercise of the reserved power must fall, if found by the courts to be repugnant to the constitution of the state or of the United States.

Another limitation suggested by the language of the court above quoted, and likewise by the remarks found in 15 Wallace, 459 and 519, is to the effect that the reserved power cannot be used to destroy or impair rights which have become vested under the charter. At page 459 the court say: "Rights acquired by third parties, and which have become vested under the charter, in the legitimate exercise of its powers, stand upon a different footing; but of such rights it is unnecessary to speak here. The state only asserts, in the present case, the power under the reservation to modify its own contract with the corporators; it does not contend for the power to revoke the contracts of the corporation with other parties, or to impair vested rights of property thereby acquired."

It could never be contended that such acts as these are within the reserved power, or that the legislature could directly interfere in a contract lawfully entered into between a subscriber to the stock and the corporation so as to deprive the subscriber of the benefits of such contract, or that it could in like manner take away vested rights of property, whether belonging to the corporation or third persons, or that it could revoke the contracts of the corporation with other parties, or impair any vested rights thereby acquired. The legislature cannot take the property of a corporation and transfer it to a third party, nor absolve the corporation from any debt or obligation which it owes or has entered

into with a third party. These would not be acts of legislation under the reserved power, because they would not operate upon or affect any of the "rights, privileges, or immunities of the corporation derived by its charter directly from the state." They would operate upon and affect, not franchises bestowed by the state, but vested rights acquired and coming from an entirely different source, namely, the contracts entered into by the parties, and which they had legal capacity to make. These are not so much instances of limitation upon the power derivable from the meaning of the word by which it is reserved, as cases falling wholly without the scope of the power.

But it seems obvious that the court did not intend and ought not to be understood by these remarks as indicating that the legislature may not, by way of alteration or repeal, operate upon the franchises of the corporation, as it finds public and private convenience and utility to require, although the effect of such action may be incidentally to diminish the ability of the corporation to pay its debts, or to depreciate the value of its stocks or bonds. All such incidental effects consequent upon the exercise of the reserved power may be fairly said to have been in the contemplation of all stockholders and creditors at the time they acquired their interests. The decision in the very case (*Tomlinson v. Jessup*) in which this language of the court occurs, is itself a refutation of the proposition that the incidental effects thus produced by the exercise of the reserved power can constitute any legal ground of complaint on the part of any one, or be assigned as a reason for holding such exercise of the reserved power invalid. It will be remembered that that was an action by a shareholder to restrain the collection of the tax imposed under the reserved power, and to have such imposition declared unconstitutional and void, on the ground that it would

destroy the value and render worthless the shares of stock held and owned by the plaintiff. But the court said: "It may be equally true, as stated by counsel, that the exemption from taxation added greatly to the value of the stock of the company, and induced the plaintiff to purchase the shares held by him. But these considerations cannot be allowed any weight in determining the validity of the subsequent taxation. The power reserved to the state by the law of 1841 authorized any change in the contract as it originally existed, or as subsequently modified, or its entire revocation. The original corporators, or subsequent stockholders, took their interests with knowledge of the existence of this power, and of the possibility of its exercise at any time, in the discretion of the legislature." So it is submitted here that the indirect results, if such should be, springing from the exercise of the reserved power, in affecting the price or value of the stocks or bonds of the corporation, or the ability of the corporation to pay its debts, cannot have any weight in determining the validity of the action of the legislature. This point is briefly but ably considered by the court of Wisconsin, 35 Wis., 578, 579.

It is manifest, if any such limitation attaches to the reserved power to alter or repeal, it must result in defeating such power altogether as to every corporation having stockholders or creditors, and thus the state or the legislature, in a vast majority of cases, would end just where they began, having gained nothing whatever by the reservation. Logically considered, as the court of Wisconsin say, this is only a denial in another form of the power to alter or repeal. It is clear that whatever limitation of the kind attaches to the power to alter, the same must also attach to the power to repeal, and as there can be no absolute repeal of the charter of a corporation having stockholders and creditors,

which may not, or which may almost be said will not, injuriously affect the pecuniary interests of its stockholders and creditors, it follows that the power is gone or can only be exercised in a few minor and comparatively unimportant cases. Few corporations are created without authority to issue stock, and the number is very small indeed of those not having the capacity to contract debts, both which things are invariably done. By issuing stock or contracting debts, and continuing either of those relations, the corporation, through the agency of its stockholders or creditors, nullifies the reserved power or secures perpetual immunity and exemption from its exercise. It seems impossible that such a proposition should be sustained, or that argument should be needed to refute it. It defeats itself by disproving the very words of the reservation, which are things incapable ot disproof. It is a vain effort to put a limitation upon the words or the power reserved by them where no such limitation exists—a limitation also utterly inconsistent with the meaning of the words and with the existence and nature of the power. Courts do not set aside and amend the contracts of parties in this way. The compacts and stipulations solemnly entered into with states and governments, securing valuable public rights and privileges, cannot thus be invaded and destroyed. It may be regarded as not very questionable, indeed, as quite certain, that over the same words found in a contract between private individuals no such controversy would ever have arisen. Acquiescing in the rule that courts interpret contracts, where interpretation is necessary, not make or unmake them, and that they give effect to them without looking to the consequences lawfully ensuing from the free acts and stipulations of the parties, or which have knowingly and voluntarily been incurred by others who have become interested, the same words in such a contract

would have been permitted to have their effect according to their plain import and meaning, and as they must have been understood by the parties. The magnitude of the interests here involved, or the fact that the people of a great state, or of many states are interested, cannot vary the question, for it is not by considerations like these that courts are governed in the construction of contracts. Effect here must be given to the words in their entirety, without forced or unnatural restrictions or conditions which will operate to defeat the plain purposes of the parties in employing them. Within the scope of the power reserved, the authority of the legislature is unlimited. It is, as this court has declared an authority to be exercised "in the discretion of the legislature."

The inquiry, therefore, is as to the extent of the power, or what acts are to be considered as within it. This inquiry also has been answered by this court. "All rights, privileges and immunities derived by its charter directly from the state" are subject to legislative control, modification or repeal under the reserved power. Whatever is given by statute may be taken away by statute. *State v. Hæflinger*, 31 Wis., 262, 263, and authorities there cited. Vested rights of property cannot be taken away by statute, because the statute does not give them, but only the capacity to acquire them. The capacity to acquire such rights in the future may be restricted, modified or taken away, because that capacity of the corporation is given to it by its charter. *Perrine v. Canal Co.*, 9 *How.* 184. Contracts lawfully entered into by or with the corporation cannot be interfered with or revoked for a similar reason. The legislature cannot say the corporation shall not be bound by its contract, nor impose upon it a contract obligation against its will.

In this case the only question is whether the right to charge and receive fares and tolls for the transportation of passengers and goods by a railroad company is a right granted by the state under the charter, for it is only upon this right the legislature has sought to operate by the act in controversy. We answer that beyond doubt it is such a right. The right of opening and establishing highways of all kinds for the use and accommodation of the public, including railroads, plank-roads, turnpikes, canals, ferries, bridges and the like, is a public right. It is a right inhering in the state as a necessary and inseparable attribute of its sovereignty. "Of the necessity and convenience of all roads and other public works and improvements, of their fitness, and the best mode of providing them, the established government of the state, acting by the legislature for the time being, must necessarily judge and determine." 2 Gray, 33. "It is plainly within the province of the legislature to determine and regulate the use of all common and public rights and easements." 13 Gray, 247. And the same is true of the right to manage and control all roads, and other such means of public travel and intercommunication. The right to charge and receive tolls for the use of roads, bridges or ferries, designed for the convenience and accommodation of the public, and used by the public, is essentially a public right, and when granted, as it can only be by the state to a natural person or corporation, it is in the strictest sense of the term a grant of a franchise. No man has a right to build a bridge over a river, or to set up a ferry, or construct and operate a railroad, for the use of the public, without the authority of the state. All these are franchises belonging to the sovereign, and not to be exercised by individuals or corporations without the grant or license of the sovereign. We are not aware that these principles were ever before seriously disputed.

They are principles which were freely conceded by the very able counsel on both sides in the argument of *Charles River Bridge v. Warren Bridge*, 11 Peters, 420.

They are directly affirmed by this court in *Perrine v. Chesapeake and Delaware Canal Co.*, 9 How., 172, where it was held that a corporation, except as authority is granted by the state, cannot lawfully demand or receive tolls for the transportation of passengers.

And again, this court recognizes and affirms the right as a public, not a private one, in *Olcott v. The Supervisors*, 16 Wallace, 695, where it is said: "Whether the use of a railroad is a public or a private one, depends in no measure upon who constructed or who owns it. It has never been considered a matter of any importance that the road was built by the agency of a private corporation. No matter who is the agent, the function performed is that of the state. Though the ownership is private, the use is public. So turnpikes, bridges, ferries, and canals, although made by individuals, under public grants, or by companies, are regarded as *publici juris*. The right to exact tolls or charge freights is granted for a service to the public."

"A ferry is *publici juris;* it is a franchise that no one can erect without the king's license." *Blisset v. Hart*, Willes' Reports, 512. See also 7 Pick. 496.

"The right to run a railroad, taking tolls or fares, is a franchise which no person or corporation can legally exercise without a special grant from the legislature." *Whiting v. The Sheboygan R. R. Co.*, 25 Wis., 206.

"The privilege of making a road and taking tolls thereon is a franchise, as much as the establishment of a ferry or a public wharf and taking tolls for the use of the same." *Beekman v. Saratoga & Schenectady Railroad Co.*, 3 Paige, 75.

"When individuals, under a charter from the government, construct works for the public accommodation, and open the works to the use of the public, this is, in law, a dedication of the works to the public use, and no toll can be demanded unless it be authorized by the charter. The reason of this is that a toll, in such a case, is a common charge which it is the prerogative of the government alone to impose and regulate. This principle seems to be well settled. Thus turnpikes have been held to be public highways, and the erection of a gate upon them without the authority of the legislature has been adjudged a public nuisance. And money exacted as a toll at such a gate has been held to be illegally taken, and the person who received it compelled by action to refund it.

"So it has been held that if individuals build a bridge by virtue of an act of the legislature they cannot legally demand toll without authority from the legislature. It is also well settled that a ferry is *publici juris*. It is a franchise which no one can erect without authority from the government. If a ferry be erected without authority, or if a franchise be abused, an information in the nature of a *quo warranto* lies." *Olcott v. Banfill*, 4 N. H. 545

"But the right to build and run a railroad, and take tolls or fares, is a franchise of the prerogative character, which no person can legally exercise without some special grant of the legislature." *State v. Boston, Concord & Montreal Railroad Co.*, 25 Vt., 442.

"It is true the plaintiffs had a right to take tolls from all who traveled or carried freight on it, according to certain rates fixed by the charter, but that was a mere franchise; a privilege derived entirely from the charter, and it was gone when the charter was repealed. The state may grant to a corporation, or to an individual, the franchise of taking tolls on any highway, opened or to be

opened, whether it be a railroad or river, canal or bridge, turnpike or common road. When the franchise ceases by its own limitation, by forfeiture or by repeal, the highway is thrown back on the hands of the state, and it becomes her duty, as the sovereign guardian of the public rights and interests, to take care of it." *Erie & Northeast Railroad Company v. Casey*, 26 Pa. St., 307.

"The subject of controversy is a mere naked, incorporeal right, claimed by the plaintiffs, to have and enjoy a right to maintain a railroad, and to take the tolls and profits thereof, a right created and granted to them by the government of the state; and they allege, whether correctly or not is hereafter to be considered, that the defendants have disturbed them in the enjoyment of this incorporeal right. It is a right or title which, if it exist at all, is purely a statutory right. It is created by law, it exists only in contemplation of law, it is invisible, intangible, and incapable of a physical possession, and depends on the law for its protection. * * * It was certainly a stipulation on the part of the government, regulating its own conduct, and putting a restraint upon its own power to authorize any other railroad to be built, with a right to levy toll; but without an authority from the government, no other company or person could be authorized so to make a railroad and levy toll, and of course no other such road could be lawfully made." *Boston and Lowell Railroad Corporation v. Salem and Lowell Railroad Company*, 2 Gray, 27, 30.

"A railroad company for popular use is *publici juris;* it cannot be legally erected without a legislative permission." *Rar. & Del. Bay R. Co. v. Del. & Rar. Canal Co.*, 18 N. J. Eq. (3 C. E. Green), 570.

The principle was also affirmed by the same court in *Del., Lack. & Western R. Co. v. Erie R. Co.*, 21 N. J. Eq. (6 C. E. Green), 298.

And again in *McGregor v. Erie Railway Co.*, 35 N. J.

Law (6 Vroom), 97, 98; where, after quoting with approbation the language of the court of Vermont, the court says: "These references indicate the current of the judicial mind, and the principle of them arises from the very nature of a railroad. A public ferry is a franchise, and consists not merely in the building of the ferry and the furnishing of the boats, but in the running of them. The right of the public to use them is common, but the running of the ferry is part of the franchise. The running of the ferry is a part of *itself*, and so the running of a railroad is part of *itself*. Whoever, therefore, is found running a public railroad for public purposes, is found exercising a function of government. Rights of this kind are only lodged in the hands of others by legislative action." See also *Blake v. Railroad Co.*, 19 Minn. 418, 421, and authorities cited.

Such are some of the authorities to prove that the right to operate a railroad for the accommodation of the public, and to receive tolls or fares, is a right or franchise derived by the corporation under its charter from the state, and which can be derived from no other source. It is believed that no adjudications or even *dicta* to the contrary can be found. The right to demand tolls is, therefore, by the decision of this court, the proper subject of legislative regulation and control under the reserved power. It is a matter resting wholly in the discretion of the legislature, when and how such regulations shall be made, and what they shall be in every particular.

Another limitation attaching to the reserved power may be found to arise out of the nature of the corporation itself, or the business in which it is authorized to engage. If it be an ordinary commercial or manufacturing corporation, authorized to trade or traffic in or to manufacture some article or articles which every man has a natural right to buy or sell, or to manufacture, it would

not seem to follow that the prices at which the corporation should buy or sell or manufacture might be regulated under the reserved power. The distinction between mere private corporations of this kind and those endowed with and exercising certain public or *quasi* public functions, has frequently been noted by the courts. The right to buy, sell and manufacture being a private and natural one, and not a public one, or one pertaining to the functions and prerogatives of the state, like the demanding of tolls, it would not be a right or privilege granted by the state, and so not one to be regulated or controlled by it.

Other limitations upon the reserved power, or cases not falling within it, may suggest themselves; but it is unnecessary to pursue the subject further here.

Other courts have expressed the same views, and held the same doctrines as to the nature and extent of the reserved power.

In New York the decisions have been quite numerous, and may be referred to as follows:

McLaren v. Pennington, 1 Paige, 102.
The Schenectady, etc., Plank Road Co. v. Thatcher, 10 N. Y., 102.
Buffalo & N. Y. City R. R. Co. v. Dudley, 14 id., 336.
In the matter of Oliver Lee & Co.'s Bank, 21 id., 9.
In the matter of the Reciprocity Bank, 22 id., 9.
The Albany Northern R. R. Co. v. Brownell, 24 id., 345.
The Northern R. R. Co. v. Miller, 10 Barb., 260.
White v. Syracuse & Utica R. R. Co., 14 id., 559.
Hyatt v. McMahon, 25 id., 457.
In the matter of the Reciprocity Bank, 17 How. Pr., 323.

In 21 N. Y., 20, the court say: "The power of the corporation to contract at all was a corporate franchise, and subject to the control of the legislature, by force of the reservation. They might wholly annihilate the power to control by repealing the act, or continue it, subject to such conditions or restrictions as they saw fit to impose. Where a party has a discretion to prohibit an act altogether, if he considers it best for his own interest, he is never bound, absolutely or unconditionally, to forbid it. He may allow it on such conditions as he supposes to be consistent with his interests."

"Regarding the reserved power to alter, modify or repeal, as a part of the compact, its literal and obvious interpretation is, that the franchises and privileges granted were at all times subject to abrogation or change by the legislative power of the state. The power reserved in this charter was one to be exercised at any time by the existing legislative authority, however constituted, and in any mode conforming to the organic law of the state for the time being." 22 N. Y., 14.

"It may be admitted that, under this reserved power to alter or repeal, the legislature would have no right to change the fundamental character of the corporation and convert it into a different legal being; for instance, a banking corporation, without absolving those who did not wish to be bound." 14 N. Y., 348.

And again, at pages 354 and 355 of the same report: "The power reserved to the legislature in the original act of of incorporation, to alter or repeal the act, is as broad in this case as in that. It is, indeed, entirely unlimited. Under the rule established in that case, no mere addition to or alteration of the charter, however great, would operate to discharge a stockholder from his obligation to the corporation. To work such a discharge the charter must be repealed, or the legislation must be such as to subvert the corporation itself; or,

at least, to destroy its identity. A mere change in name has been repeatedly held not to have that effect."

In Massachusetts the question has been considered and the same general principles affirmed in the following adjudications:

Crease v. Babcock, 23 Pick., 334.
Roxbury v. The Boston & Prov. R. R. Cor., 6 Cush., 424.
Boston & Lowell R. R. Cor. v. Salem & Lowell R. R. Co., 2 Gray, 1.
Mass. General Hospital v. St. Mut. Life Ass. Co., 4 Gray, 227, 234.
Commonwealth v. Essex Company, 13 Gray, 239.
Fitchburgh R. R. Co. v. Grand Junct. R. R. Co., 4 Allen, 198.
Commonwealth v. Eastern R. R. Co., 103 Mass., 254.
Commissioners of Fisheries v. Holyoke Company, 104 Mass., 446.
Mayor, etc., of Worcester v. Norwich & Worcester R. R. Co., 109 Mass., 103.
Parker v. Metropolitan Railroad Company, ib., 506.

The case last cited confirmed the validity of an act reducing and limiting the rates of toll to be charged by ferry companies for passengers transported on the cars of street railway companies.

In *Mayor, etc., of Worcester v. Norwich and Worcester R. R. Co.*, p. 113, the court say: "As the right of the legislature to alter, amend or repeal the charters of these corporations is absolute, and not dependent upon their consent, it is immaterial whether such consent has been given or not."

In Maine the question has been considered in the four following cases, and perhaps others:

Proprietors, etc., v. Haskell, 7 Greenl., 474.
Read v. Frankfort Bank, 23 Maine, 318.
Meadow Dam Co. v. Gray, 30 ib., 547.
Oldtown & Lincoln Railroad Co. v. Veazie, 39 ib., 571.

In New Jersey the decisions are the same.

Story v. The Jersey City, etc., Pl'k R'd Co., 16 N. J. Eq. (1 C. E. Green), 13.
The State v. Miller, 30 N. J. Law (1 Vroom), 368.
The State ex rel., etc., v. Miller, 31 N. J. Law (2 Vroom), 521.
The State ex rel., etc., v. The Mayor, etc., ib., ib., 575.

In the case first cited, p. 21, the Chancellor says: "When the charter of the company of which the complainant claims to be a stockholder, was granted, it was provided by general law of the state that the charter of every corporation, granted by the legislature, should be subject to alteration, suspension and repeal, in the discretion of the legislature. The legislature, therefore, in granting the charter to the plankroad company, must be deemed to have reserved to themselves the right of altering, suspending or repealing the charter, whenever, in their discretion, the public good might require it, as fully as if the reservation were inserted in the charter. And all contracts, expressed or implied, resulting from the act of incorporation and its acceptance by the stockholders, must be deemed to have been entered into by both parties, subject to the reservation."

In the other cases it was resolved by the court:

1. "That no irrepealable contract can result from the provisions in a charter which is made, in terms, subject to alteration, amendment or repeal by the power granting it."

2. "Where the right to alter or amend a charter, whenever the public good may require, is reserved, the legislature is the proper tribunal to determine when the right shall be exercised."

In Indiana the words, to alter or repeal, have received the same construction. *Wilson v. Tesson*, 12 Indiana, 285. The court say: "It was in the power, then, of the legislature to terminate the existence of banks, created under said act, at its pleasure."

In Rhode Island a like construction has been given.

Bailey v. Trustees, etc., 6 R. I., 491.
Gardner v. Hope Insurance Co., 9 R. I., 194.

In Minnesota likewise.

Perrin v. Oliver, 1 Minn., 202.
Blake v. Railroad Co., 19 Minn., 418.

In Iowa.

Miners' Bank v. The United States, 1 Green, 563.

In Kentucky.

Sage v. Dillard, 15 B. Mon., 347.
Louisville v. President, etc., ib., 642.

And in Pennsylvania.

Erie & Northeast Railroad v. Casey, 26 Pa. St., 287, 302.

Such are the authorities, and when the question comes to be considered on principle, it is difficult to perceive how otherwise it could have been held and decided by the courts. The creation of corporations is a prerogative of sovereignty—an absolute, unqualified power of the state, to be exercised or not as the legislature shall see fit; and at such times, in such manner, and subject to such conditions and reservations as the legislature, in its own sovereign pleasure, shall determine, regard being had only to the restrictions upon the legislative power contained in the constitution of the state. The legislature may, therefore, by statute, or the people, by fundamental law, reserve whatsoever control and authority over these beings of their creation they will, and there is no power lodged elsewhere under our system of government to deny this sovereign right, or to interfere or prevent its exercise. The power which creates at its own free will and pleasure, may reserve the power to destroy the corporation or being created, or to prescribe the conditions upon which its future or continued existence shall depend.

This principle has been so recently and fully and clearly recognized by this court, that a quotation of the language of the court suffices to put the matter at rest. In *Railroad Company v. Maryland*, 21 Wallace, 471, the court say: "This unlimited right of the state to charge, or to authorize others to charge, toll, freight, or fare, for transportation on its roads, canals, and railroads, arises from the simple fact that they are its own works, or constructed under its authority. It gives them being. It has a right to exact compensation for their use. It has a discretion as to the amount of that compensation. That discretion is a legislative—sovereign—discretion, and in its very nature is unlimited and uncontrolled. The security of the public against any abuse of this discretion resides in the responsibility of the public of those

who for the time being are officially invested with it. In this respect it is like all other legislative power when not controlled by specific constitutional provisions, and the courts cannot presume that it will be exercised detrimentally."

The power of the state, when reserved as in this case, over the corporations to which it has given being, is in character and extent the same as its authority over its own works of internal improvement. It is a sovereign legislative power, in its very nature unrestricted and uncontrolled.

Nor is this control of the state over corporations, by which the value of their franchises may be destroyed or the value and productiveness of their property or of the property of their stockholders or creditors may be diminished or taken away, anything new in the history of American law upon this subject. In one sense, a broad political one, all citizens and subjects, corporations included, are indebted to the government for all their rights of property, as well of life and liberty, for without the aid and protection of the state no such rights could exist or be maintained. Property in the legal sense, that is, the right of possession, enjoyment and transmission, according to the concessions and provisions of municipal or particular law enforced by the present command and sanction of the state, is a creation of the state. In this sense the property of all citizens belongs to the state, and may be appropriated by it as the exigencies of its affairs demand. In this sense it is the duty of every citizen to yield all, and in the power of the state to take all, if the necessities of the state require. The duty of the citizen arises out of the protection which the state has afforded and will afford in the future. This is the source of the taxing power and the ground on which it rests. That this is a power without restriction, one " which acknowledges no other limits

than those expressly prescribed in the constitution, and like sovereign power of every other description, is trusted to the discretion of those who use it," is a principle which is well settled and well understood. "All subjects over which the sovereign power of a state extends, are objects of taxation. The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission. The power of taxing may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The power to tax involves the power to destroy." *McCulloch v. Maryland*, 4 Wheaton, 427, 428, 429, 431.

This power to destoy corporations of its own creation each state of the Union has always possessed, even where the charter of the corporation became a contract between the state and the corporation, within the protection of the clause of the constitution of the United States prohibiting the state from passing any laws violating the obligation of contracts. The power to tax is not limited by that clause of the federal constitution, but overrides it. This was expressly held by this court in *Providence Bank v. Billings*, 4 Peters, 513: "A power to tax the bank may unquestionably be carried to such an excess as to take all its profits, and still more than its profits, for the use of the state, and consequently destroy the institution. Now, whatever may be the rule of expediency, the constitutionality of a measure depends not on the degree of its exercise, but on its principle. This vital power may be abused; but the constitution of the United States was not intended to be the corrective for every abuse of power which may be committed by state governments. The interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security, where there is no

express contract, against unjust and excessive taxation, as well as against unwise legislation generally."

And the same principle was again distinctly affirmed in *Bank of Commerce v. New York City*, 2 Black., 620, 630, where it is said that uniformity of taxation is a restraint self-imposed by the state, and that the state, in the exercise of the power, may discriminate so as to destroy; and these questions are asked and answered: "But is this court a fit tribunal to sit in judgment upon the question whether the legislature of a state has exercised its taxing power wisely or unwisely over objects of taxation confessedly, as the argument assumes, within its discretion? And is the question a judicial question? We think not."

A still more remarkable instance where the power to tax was confessedly used as a power to destroy, is found in the law of Congress taxing the circulation of the state banks, the constitutionality of which was upheld by this court in *Veazie Bank v. Fenno*, 8 Wallace, 533. It was there decided that Congress might constitutionally resort to the power of taxation as a means of destroying the currency of the states, in order to carry into effect the constitutional powers of the Federal Government to provide a currency for the whole country.

Another means always at the command of a state by which to destroy, or render valueless, the franchise of a corporation of its own creation, was by the creation and fostering of rival institutions of the same kind. This was decided in the celebrated case of the rival bridge charters, *Charles River Bridge v. Warren Bridge*, 11 Peters, 420. This power of the legislature, which it might always exercise unless restricted by express words in the charter of the corporation first created, was likened by the court to the power of taxation. At page 547 the Chief Justice says: "The argument in

favor of the proprietors of the Charles River Bridge is the same almost, in words, with that used by the Providence Bank; that is, that the power claimed by the state, if it exists, may be so used as to destroy the value of the franchise they have granted to the corporation. The argument must receive the same answer; and the fact that the power has been already exercised so as to destroy the value of the franchise, cannot in any degree affect the principle. The existence of the power does not, and cannot depend on the circumstance of its having been exercised or not." See also, *Turnpike Co. v. The State*, 3 Wallace, 210. *Railroad Co. v. Railroad Co.*, 13 Howard, 71.

II.

Have the stockholders or creditors of the corporation any rights beyond and superior to those possessed by the corporation itself, in respect to the reserved power, for the protection of which they can intervene between the state and the corporation, so as to prevent the exercise of a power expressly retained by the act of incorporation, and as a part of the law by which the corporation has its existence? Can a corporation whose existence and all whose franchises are expressly determinable by the power creating it, defeat the exercise of such power by issuing stocks or contracting debts? Can it mortgage itself or its franchise into perpetuity? Can it defeat the reserved power to alter or amend, or prolong its existence, or the existence of its franchises and privileges, indefinitely, without alteration or amendment, by like means? Can it give to its stockholders or creditors rights which itself does not possess? Can a corporation expressly limited by its charter to a

duration of twenty years, extend that period to a hundred years by incurring a debt which will require for it that length of time to pay? Can such a corporation prolong its existence and hold and exercise its franchises forever, by contracting a debt which it can never pay? To answer these questions in the affirmative requires a degree of assurance seldom witnessed. It would be to carry the doctrine of the protection afforded by the constitution of the United States to the obligation of contracts to a most unprecedented and alarming length. All reason and all authority is against such a solution of the questions.

It is a general principle, elementary in its nature, too plain to admit of argument in its support, that no one can transfer to or vest in another a right or title which he himself does not possess. The exceptions to this rule growing out of the doctrine of estoppel, or out of the rules of the law merchant and those governing in some other cases, are purely legal and technical, and have no application to the facts of this case. "The rule which limits the right of the buyer by that of the seller, and subjects the title of the one to every drawback or defect which attached to that of the other, is a general rule, both of law and of reason." *Basset v. Nosworthy*, 2 Lead. Cases in Equity, 12, 80, *note.* This rule was applied as between mortgagee and mortgagor in *John v. Larson*, 28 Wisconsin, 604.

The same rule is recognized by this court in *Judson v. Corcoran*, 17 Howard, 612, 615, where it is thus stated: "It is certainly true, as a general rule, as above stated, that a purchaser of a chose in action, or of an equitable right, must abide by the case of the person from whom he buys, and will only be entitled to the remedies of the seller."

Speaking of the opposite position, as contended for by stockholders and creditors, the court of Wiscon-

sin say: "This position appears to us to rest in the absurdity that the mortgagor can vest in his mortgagee a greater estate than he had himself. Perhaps the statute may lessen the means of payment of the defendants. So would a fine for homicide, under the police power of the state. But to lessen the means of payment of a contract, is not to impair the obligation of the contract. These defendants took their franchises, and their creditors invested their money, subject to the reserved power, and suffer no legal wrong when that is exercised." 35 Wis., 578.

No positive or written law can be more public than that found in the constitution of a state, and presumptively none can be more widely known or generally noticed and understood, by persons interested in the legislation and affairs of the state, than the provisions of such a law. "This act is a public act, accessible to all, and supposed to be known to all; and the plaintiffs must, therefore, be presumed to have dealt with the defendants with a full knowledge of their respective rights, whatever those rights may be. JERVIS, C. J., in *The East Anglian Railways Company v. The Eastern Counties Railway Company*, 11 Common Bench (2 J. Scott), 775, 811. 73 English Common Law, 810. Just so it must be said here, that the plaintiffs dealt with the defendant company, or in its stocks and securities, with a full knowledge of the rights of the company, whatever these rights may be, and that coming with such knowledge, and assenting to such rights and disabilities of the company, they must share the legal fate of the company, whatever that fate may be. This was their agreement, and they cannot now be permitted to set up the obligation of a contract which they never made, which the state never made with them, nor authorized the company to make, and which the company was especially incapacitated from making. The company could

give to its stockholders no perpetual rights to hold their stocks and receive dividends upon them, and the stockholders knew it. Neither could the company give to its mortgagees or bondholders any perpetual rights to hold its franchises in mortgage or to use and enjoy such franchises, beyond the power of the state to alter or repeal, because the company had no such rights to give and the mortgagees knew it. There was not, therefore, and in the nature of the case could not be, any such contract or obligation of contract as that of the violation of which the plaintiffs complain.

That the repeal of the charter or the dissolution of the corporation, the legislature having athority to do so, would not infringe the obligations of its contracts with its creditors, has already been decided by this court. That the alteration of the charter, authority for that purpose existing, does not do so, is equally clear. In *Mumma v. The Potomac Company*, 8 Peters, 281, 286, the court say: "We are of opinion that the dissolution of the corporation, under the acts of Virginia and Maryland, cannot in any just sense be considered, within the clause of the Constitution of the United states on this subject, an impairing of the obligation of the contracts of the company by those states, any more than the death of a private person can be said to impair the obligation of his contracts. The obligation of those contracts survives, and the creditors may enforce their claims against any property belonging to the corporation, which has not passed into the hands of *bona fide* purchasers, but is still held in trust for the company, or for the stockholders thereof, at the time of its dissolution, in any mode permitted by the local laws." This language was approved by the court in *Curran v. The State of Arkansas*, 15 Howard, 311.

Again, in *Pennsylvania College Cases*, 13 Wallace, 218: "Undoubtedly the corporate franchises of the

two institutions were contracts of the description protected by the clause of the constitution which ordains that no state shall pass any law impairing the obligation of contracts, but the contract involved in such an act of incorporation is a contract between the state and the corporation, and as such the terms of the contract may, as a general rule, be altered, modified or amended by the assent of the corporation, even though the charter contains no such reservation, and there was none existing in any general law of the state at the time the charter was granted. Persons making contracts with a private corporation know that the legislature, even without the assent of the corporation, may amend, alter or modify their charters in all cases where the power to do so is reserved in the charter or in any antecedent general law in operation at the time the charter was granted, and they also know that such amendments, alterations and modifications may, as a general rule, be made by the legislature with the assent of the corporation, even in cases where the charter is unconditional in its terms, and there is no general law of the state containing any such reservation. Such contracts made between individuals and the corporation do not vary or in any manner change or modify the relation between the state and the corporation in respect to the right of the the state to alter, modify or amend such charter, as the power to pass such laws depends upon the assent of the corporation or upon some reservation made at the time, as evidenced by some pre-existing general law, or by an express provision incorporated in the charter."

"The creditors of the bank cannot object to the constitutionality of the act dissolving the corporation, when it was done for causes which by the charter were sufficient for the purpose, and when the repeal was conclusive upon the bank. Indeed, it is not seen how *any* objection can be made by those who had no other con-

nection therewith than that of being creditors. Whoever entered into contracts with it, exposed himself to losses which might arise from its dissolution, as he would with natural persons, by their death. No security was provided in the charter, or other statute, against such an exposure to injury." *Reed v. Frankfort Bank*, 23 Maine, 318.

"But it is said that the corporation could not, by any act or omission of its own, implicate its stockholders in a liability which they had not consented to assume, and which, on the contrary, they had declared they would not incur. But they had voluntarily consented to become stockholders upon the conditions held out by the general banking law. One of those conditions was that the legislature might amend and alter the act, and in that way change and modify the constitution of the corporation. A change under this reservation to alter might render their investment more or less profitable, or their position more or less hazardous. Whatever peril it entailed they consented to assume. Stockholders cannot put in the plea *non in haec foedera veni*." 21 N. Y., 20, 21.

"Every one who enters into such a company is aware of the reservation of the power and of the possibility of its exercise, and trusts, as in many other matters he must, to the wisdom and justice of the legislature that this power will not be abused." 1 Kernan, 114.

It is confidently submitted, therefore, that where the corporation itself cannot complain of the exercise of the reserved power to alter or repeal, then no stockholder or creditor can do so, or interpose to set aside the laws of the state constitutionally enacted.

III.

The question whether chapter 273 of the laws of Wisconsin, passed in the year 1874, being the act in question regulating freights and fares, was repealed by section 2 of chapter 292 of the laws of the same year, as submitted in the bill of complaint, is one which belongs to the state court, and which has already been decided by that court adversely to the plaintiffs. So of all other questions of statutory construction raised by the plaintiffs. *The Attorney General v. Railroad Companies*, 35 Wisconsin, 425.

IV.

And the same is true of the objection that the act in question contravenes the article of the constitution of the state of Wisconsin that "the property of no person shall be taken for public use without just compensation therefor." The court of Wisconsin in the same case, giving a construction to this article of the constitution of the state, has decided that the act does not conflict with it. It is obvious that the exercise by the state of the reserved power to alter or repeal the charter of a corporation bears no more resemblance to the exercise of the right of eminent domain than does the exercise of the power of taxation. In a case of taxation—a Wisconsin case—this court has said: "The objection that these acts take private property for public purposes without compensation, and hence are within the prohibition of the state constitution upon that subject, is also without foundation. The clause of the constitution refers solely to the exercise, by the state, of the right of eminent domain." *Gilman v. City of Sheboygan*, 2 Black., 513.

V.

The inter-state commerce question raised by the bill has been disposed of by this court in a cause decided since the bill was filed. *Railroad Company v. Maryland*, 21 Wallace, 456. That case directly affirms the right of the state to regulate the rates of tolls and fares on its own roads, canals, and railroads, or those constructed under its authority and within its borders, and that such regulations for passengers or freight to be taken up in the state and carried out of it, or received out of the state and brought into it, are not inconsistent with the provision of the constitution of the United States giving to Congress the power to regulate commerce between the states. It is difficult to perceive, at all events, how regulations like those here complained of, calculated to facilitate commerce and travel between the states and not impede them, and making no unjust discriminations, can be said to violate that provision of the federal constitution. There is not the slightest analogy between this case and that of *Crandall v. Nevada*, 6 Wallace, 35, nor any other in which it has been held or suggested that state regulations were invalid on the ground here taken.

VI.

The position that the legislature of Wisconsin, by authorizing the corporation of its own creation to consolidate with one of the same or a different name, incorporated by the legislature of another state, whose charter was irrepealable, thereby lost control under the reserved power, seems altogether untenable. It is

wholly incompetent for the legislature in this or in any other way to release or destroy the reserved power. The power remains by the constitution, whatever the legislature may say or do. But the effect of such consolidation was not to change or affect in the least the Wisconsin corporation for all the purposes of the reserved power. Speaking of a like case, where the corporations of the different states had been authorized by laws of Massachusetts and Rhode Island to consolidate, Judge Story says: "Although by virtue of these several acts, the corporations acquired a unity of interest, it by no means follows that they ceased to exist as distinct and different corporations. Their powers, their rights, their privileges, their duties, remained distinct and several, according to their respective acts of incorporation." *Farnum v. Blackstone Canal Co.*, 1 Sumner, 47, 62. Such still continues to be the relation of the Wisconsin corporation to the State of Wisconsin, by which it was created, notwithstanding the assent of the legislature of the state to its consolidation with a corporation created by the State of Illinois, or by any other state. It is still subject to the reserved power, and to such control over its franchises as the constitution gives.

Speaking of the effect of the consolidation of an Illinois railroad company with a Wisconsin railroad company under the authority of acts of legislatures of each state, the Supreme Court of Illinois held: "While it created a community of stock and of interest between the two companies, it did not convert them into one company, in the same way, and to the same degree that might follow a consolidation of two companies within the same state. Neither Illinois nor Wisconsin, in authorizing the consolidation, can have intended to abandon all jurisdiction over its own corporation created by itself. Indeed, neither state could take juris-

diction over the property or proceedings of the corporation beyond its own limits, and, as said by the court in *The O. & M. R. R. Co. v. Wheeler*, 1 Black., 297, 'a corporation can have no existence beyond the limits of the state or sovereignty which brings it into life and endows it with its faculties and powers.' In the same case the court say, that a corporation cannot be created by the co-operating legislation of two states, so as to be the same legal entity in both states, and where two states have each created a corporation of the same name, for the same purposes, and composed of the same natural persons, it must nevertheless be considered as a distinct corporation of each state." See also, *McGregor, qui tam, v. Erie Railway Co.*, 35 N. J. Law (6 Vroom), 115, 118, and cases there cited.

In conclusion it is submitted that the State of Wisconsin has committed no wrong, violated no rule or principle of constitutional law, state or national, by the legislative act complained of. Nay more, it is submitted that the reproach of violating the principles of national justice ought not to, and does not rest upon the state. Whether the act will lessen the income of the property of the defendant company, no one can foresee. This is, or until recently has been, matter of conjecture merely. Experience—actual trials thus far had under the act, have not demonstrated that it will be so. On the other hand it is believed by many, whose judgment and opinions are based on careful examination and study of statistics and comparisons of figures, that such has not been and will not be the effect of the law. It is believed by many, well able to judge, that the income and earnings of the railroads of Wisconsin have increased, and will continue to increase, under the law. But should the fact be otherwise and the claim of the plaintiffs prove true, the state will be the first to recognize it, and to correct the wrong by the repeal or modification of the

law. The honor of the state, her sense of justice, the interests and prosperity of her people, as also those principles of law to which all civilized nations must yield, will all equally bind the state to do this, and these are obligations from which she will never seek to escape. They are obligations which could not be disregarded by the state without forfeiting her honorable position among the states of the Union. Let it be shown that the act is oppressive and wrong in the particulars here complained of, the plaintiffs will not appeal to the state in vain for redress. Their objections will be listened to with respect, and examined with that impartiality and care which justice and equity demand. As yet it is believed that the conduct of the state has been neither undignified nor unjust, whilst she has been met at every point by the railway companies and those interested in them only in a spirit of open and uncompromising defiance and hate. The excited popular sentiment, if any such exists in the state of Wisconsin against railroad corporations, and which has certainly been greatly exaggerated, is attributable, therefore, to the conduct and attitude of the corporations themselves. The cause being removed, the days of calmer judgment and wiser counsels will soon be restored. The people of Wisconsin will submit to anything rather than a sacrifice of their honor, or that any stain should rest upon their name. They are fully conscious that the great elements of public liberty lie in the firm protection of private vested rights. They are deeply interested, too, in the preservation of those principles by which such rights shall not be unsettled, or subjected to mere popular whim or caprice, as any people can be; and yet they are at the same time sensible that vested rights, so called, may be urged to such extremes as to become grievous public burdens, and inconveniences intolerable to the state. Such, they submit, is the char-

acter of the rights, improperly so denominated here, and such would be the consequences of a decision upholding them as claimed by the plaintiffs in these actions. Cheerfully submitting their rights to the determination of this honorable court, and confiding in its judgment, the people of Wisconsin cannot believe that the doctrine of vested rights will be carried to such dangerous extremes, or that there is to be any presumption here that the state is incapable of guarding her own honor, or will pursue, towards her own corporations or citizens, any but an enlightened, liberal and just policy.

Oct. 18, 1875.

L. S. DIXON,

Of Counsel for the Defendants,

The Railroad Commissioners,

And the Attorney General of the State of Wisconsin.

115 Chicago 422

UNITED STATES OF AMERICA.

94-164

SUPREME COURT.

WILLIAM FREDERICK PIEK AND OTHERS,
COMPLAINANTS AND APPELLANTS,

vs.

THE CHICAGO & NORTHWESTERN RAILWAY COMPANY, GEORGE H. PAUL, JOSEPH H. OSBORN, JOHN W. HOYT, AND A. SCOTT SLOAN,
DEFENDANTS AND APPELLEES.

Brief and Points.

A. SCOTT SLOAN,
Attorney-General of Wisconsin
I. C. SLOAN,
Of Counsel.

E. B. Bolens, State Printer, Statatesman Office, Madison, Wis.

Supreme Court of the United States.

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DEFENDANTS AND APPELLEES.

ABSTRACT OF CASE.

The complainants are non-residents of the State of Wisconsin, and are owners of first-mortgage bonds of the Chicago & Northwestern Railway Company. They file their bill of complaint to restrain said railway company from obeying; and the defendants, George H. Paul, Joseph H. Osborn, and John W. Hoyt, who are Railroad Commissioners, and A. Scott Sloan, who is Attorney-General of the State of Wisconsin, from enforcing a law of the State, (chapter 273, laws of 1874,) which limits the rate of charges for transporting passengers and freights on all the railroads in the State.

The bill sets out the various acts by which the said railroad company was incorporated.

That the company was authorized to borrow money and to execute mortgages to secure the payment of the same.

That the complainants are severally the owners of bonds issued or guaranteed by said railroad company and secured by mort-

gages upon various portions of its railroad, executed in pursuance of the laws of the State.

That the tariff of rates charged by said company before the passage of chapter 273, laws of 1874, did not produce sufficient income to pay operating expenses, repairs, interest on the debt, and the legal rate of interest allowed by the laws of this State, to its stockholders.

Sets forth in full chapter 273, laws of 1874.

That the enforcement of said act "will be either the failure of the company to pay its bonded debt and interest, or a suspension of the operation of its railroad in Wisconsin, and the consequent destruction of the securities held by the complainants."

That the classes of freight established by section three of said act are different from the classes of freight established by the laws of Illinois, Iowa, and Minnesota, for the transportation of freight upon the railroads of said company in said several States, and that it is practically impossible to carry on the business of transporting freight from Wisconsin to either of the other States mentioned.

That the complainants are advised that the enforcement of said act would impair the obligation of the contract entered into between said railway company and the complainants, and for that reason said law contravenes the Constitution of the United States.

That said act is in violation of the thirteenth article of the bill of rights of the constitution of the State of Wisconsin, viz.:

"The property of no person shall be taken for public use without just compensation therefor."

That the legislature of Wisconsin had no constitutional power to pass said act.

That the eighteenth section of said act is a regulation of inter-State commerce, which the legislature of Wisconsin had no power to enact.

That said railroad company has never accepted said act, but that it will be obliged to accept the rates of fare and freight specified in said act, or cease the operation of its road in Wisconsin, unless said act shall be held to be unconstitutional and

void, as the complainants are advised and believe, "and in either event the security which is held by your orators severally for the payment of the bonds owned by them, would be wholly destroyed," (page 45.)

That by chapter 341, laws of 1874, being an act of the legislature of Wisconsin, passed March 12, 1874, which was a day subsequent to the passage of said chapter 273, said railroad company was authorized to charge reasonable rates, and submit whether said first-named act did not repeal the latter.

Also, that chapter 292, laws of 1874, State of Wisconsin, repealed said chapter 273, laws of 1874.

That George H. Paul, Joseph H. Osborn, and John W. Hoyt have been appointed Railroad Commissioners of the State under said chapter 273; have accepted the appointment, and entered upon the discharge of their duties. That the complainants greatly fear that said commissioners will proceed to classify in some one or other of the classes named in the act, the articles of freight which are not specifically classified by the act; and that said commissioners will also proceed to reduce the rates of freight and fare upon the railroad of said company, unless restrained by an order of the court.

That sundry prosecutions have already been commenced against the agents of said company, at different places in the State, for alleged violations of said law in charging greater rates of toll than those prescribed by chapter 273; that said agents have been arrested, and would have been imprisoned if the company had not procured bail for them.

That the Governor of the State has issued two proclamations since the law took effect, in which he states his intention to enforce all the provisions of said act by all the means in his power; and in one of said proclamations requests and enjoins all district attorneys promptly and vigorously to prosecute to conviction and punishment, all offenders against said law; and further states that "printed forms and instructions for the prosecution of such actions will be promptly furnished on the request of any officer of the law made to the Attorney-General at Madison."

That other persons, whose names are unknown, but whom leave is asked to make parties when discovered, are preparing and intending to bring suit against said company for the purpose of enforcing said act. That said company will be harrassed with a great multiplicity of suits, and its business seriously injured and impaired, and the security of complainants greatly impaired and depreciated, unless the parties named shall be restrained.

That in consequence of the passage of said chapter 273, and the proposed enforcement of the same by the said Railroad Commissioners and the Attorney-General, and the arrest of the agents of said railway company, the value of the securities held by the complainants has very greatly depreciated; and the complainants have applied to said railway company, and requested it to cause such legal proceedings to be instituted in its name as would effectually protect the rights of the holders of the bonds of said railway company against all attempts to enforce the said act, either through the Railroad Commissioners or by prosecution of the officers of said company, because the enforcement of the act would impair the obligation of the contract made by the said railway company with the holders of said bonds, and greatly impair the value of their securities. That complainants requested said company to consider the fact that the passage of the act had already greatly depreciated the value of said bonds, and that the proposed enforcement of said act, in the ways contemplated by its provisions, must inflict irremediable injury upon the property which stands as security for the bonds of said company. But said company, acting through its board of directors, has declined to take the steps necessary to protect the rights of the complainants, either by the institution of the necessary legal proceedings or in any other manner.

The complainants, therefore, charge that the defendants, Geo. H. Paul, Joseph H. Osborn, and John W. Hoyt, and A. Scott Sloan, the Attorney-General of said State, are preparing to institute, or cause to be instituted, a great multiplicity of suits against the said railway company and its agents, for the purpose of enforcing the provisions of said chapter 273; and unless said

Railway Commissioners and Attorney-General are restrained by the order of this honorable court, they will cause a great number of suits to be instituted against the local agents of said company, which suits would greatly embarrass said company, subject it to heavy expenses, and compel it, in whole or in part, to suspend its business, and thereby impair its means of discharging the interest due complainants and other bond-holders.

The complainants further charge that said Railroad Commissioners and Attorney-General are preparing to have the agents of said railway company, along all the line of its railroad in Wisconsin, arrested and imprisoned under the provisions of said act. And that they will do so unless restrained by order of this honorable court, and that if the agents of said company are so arrested the said company will be compelled either to operate its railroads under said act in such manner as to fail to raise sufficient revenue to pay the necessary operating expenses thereof, and to pay for keeping said roads and their equipments in a proper state of repair, and to pay the interest on its bonds, and to provide a proper and reasonable sinking fund to pay the principal of said bonds, or to cease from operating said railroads altogether, and in either case the value of the stock (bonds) owned and held or represented by complainants, would be greatly depreciated or wholly destroyed.

Prayer, that the railroad company may be enjoined from accepting the act or complying with its terms in operating their road.

That the Railroad Commissioners be enjoined from fixing rates or classifying freight; and,

That the Railroad Commissioners and Attorney-General may be enjoined from arresting, or causing, or aiding, or abetting in the arrest of any agent of said railway company, or from instituting or causing to be instituted against said company, its agents or officers, any suit or other proceedings to enforce the said chapter 273.

To this bill the Railroad Commissioners and Attorney-General interposed a general demurrer for want of equity.

The demurrer was sustained, and a decree dismissing the com-

plaint entered, reserving the right to the defendants to raise any question as to the jurisdiction of the circuit court or otherwise which they might think proper.

POINTS AND AUTHORITIES.

I.

The circuit court had no jurisdiction of this cause, because the State was the real party in interest.

The defendants are only nominal parties. The relief really sought is to enjoin the State from testing in its own courts the validity of one of its own laws.

By the eleventh amendment to the Constitution of the United States, the State cannot be made a party. The same exemption should be extended to the officers or agents of the State unless they do or threaten to do some act for which an action would lie against them personally.

This case is distinguished from all the reported cases, in which this court has decided that United States circuit courts had jurisdiction of actions against the officers and agents of States; in this, that, in all those cases some acts had been committed or threatened which would hvae rendered the officer or agent personally liable, in an action brought by the party injured by such act. But here the only allegations, in substance, are that the Attorney-General will institute proceedings in the courts to have the validity of the law determined, and if valid to have the penalties enforced, and that the Railroad Commissioners will classify freights, and fix rates for transportation of such as are not definitely fixed by the law, and that the Attorney-General and commissioners intend to prosecute the agents of the company in the courts, to enforce the penalties given by the law.

It will be observed that there is no allegation that either the Attorney-General or commissioners have done any acts on which the fears and conclusions of the complainants are based.

This court will take judicial notice of the public statutes of Wisconsin, and therefore know that neither chapter 273, laws

of 1874, nor any other statutes of the State imposes the duty of prosecuting the agents of the company for violation of that act, upon either the Attorney-General or Railroad Commissioners, and it is submitted that the allegations are not sufficient to warrant the court in concluding that these officers are about to do any of the acts which the complainants fear they may do. But however that may be, the allegations in the bill furnish no sufficient grounds for the circuit court to assume jurisdiction of the cause, or to enjoin those State officers from performing their duty to the State as required by the law.

There is no pretense that they intend to take or in any way interfere with the property of the railroad company, or to do any act for which an action at law could be maintained against them personally.

In Osborn *vs.* U. S. Bank, (9 Wheat., 738,) the money of the bank had been actually taken and was then in the possession of the defendants. Chief Justice Marshall, in delivering the opinion of the court, says, page 842:

"It is admitted that the privilege of the principal is not communicated to the agent; for the appellants acknowledge that an action at law would lie against the agent, in which full compensation ought to be made for the injury. It being admitted, then, that the agent is not privileged by his connexion with his principal, that he is responsible for his own act, to the full extent of the injury, why should not the preventive power of the court be applied to him? Why may it not restrain him from the commission of a wrong which it would punish him for committing? * * * * Now, if the party before the court would be responsible for the whole injury, why may it not be restrained from its commission if no other party can be brought before the court? * * * * Will it be said the action of trespass is the only remedy given for this injury? Can it be denied that an action on the case for money had and received to the plantiff's use might be maintained? We think it cannot; and if such an action might be maintained, no plausable reason suggests itself to us for the opinion that an injunction may not be awarded to restrain

the agent with as much propriety, as it might be awarded to restrain the principal, could the principal be made a party."

It is apparent that there is a wide difference in the facts between that case, and the one at bar; here there is no allegations that the Attorney-General or Railroad Commissioners contemplate doing any act which would make them amenable to an action brought by either the complainants or the railroad company in any form or in any court. But it is proposed to the United States circuit court, to invade the offices in the State Capitol, and there suspend the functions of the State officers, and to silence the Attorney-General in the courts of the State by injunction; as well might the United States circuit court have enjoined the Governor from approving the law, or the legislature from passing it, upon the allegation that its passage or approval would injuriously affect the securties of the complainants.

There is also a wide difference between the character of the parties in the two cases. In the reported case the complainant was the fiscal agent of the United States, created and invested with its powers and rights by act of Congress, and the case involved an inquiry as to public rights. The chief justice states the question on page 849, as follows:

"The question, then, is, whether the Constitution of the United States, has provided a tribunal which can peacefully and rightfully protect those who are employed in carrying into execution the laws of the Union from the attempts of a particular State to resist the execution of those laws."

In the case at bar private right is alone involved—rights affecting only the State and one of its own corporations, or what is the same thing, the creditors of such corporation.

This straining after power by the Federal circuit courts can only be excused upon the injurious assumption that the courts of the State are either incapable or unwilling to administer justice fairly and impartially. The case of Dodge *vs.* Woolsey, 18 Howard, 331, also differs from the one at bar, in this, that the defendant, Dodge, as tax-collector threatened to sieze the money or property of the bank and thus to commit an act which would

have made him liable in an action of trespass, or for money had and received, thus bringing the case within the principle laid down in Osborn *vs.* The Bank, *supra.*

But here neither the classifying freights nor fixing the tolls therefor, nor the commencement of proceedings in court, would have been any interference with the rights of property of the complainants or of the company, or rendered the commissioners or Attorney-General liable to an action. The allegation that the commissioners and Attorney-General were about to prosecute the agents, states a conclusion, which could only rightfully be drawn from facts, that is from their own acts or sayings, none of which are stated, for the simple reason that none existed. Courts of equity ought not to issue injunctions upon such loose statement of mental conclusions; the facts from which the pleader draws his conclusions should be stated.

We therefore protest against the exercise of the jurisdiction claimed for the circuit court in this case as being an unwarranted invasion of the sovereignty of the State, and an unnecessary and dangerous encroachment on State rights.

II.

Chapter 273, laws 1874, is valid. The legislature possessed the constitutional power to enact it.

Upon the subject of corporations the constitution of Wisconsin is as follows:

Article XI, Sec. 1. "Corporations without banking powers or privileges may be formed under general laws, but shall not be created by special act except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. All general laws or special acts enacted under the provisions of this section may be altered or repealed by the legislature at any time after their passage."

The power reserved to the legislature to alter or repeal acts of incorporation is in its terms unlimited; the object of this reser-

vation of power is well known. Since the decision of the Dartmouth-College case, in 1819, in which this court held that a charter of incorporation was in the nature of a grant creating a contract, beyond the power of the legislature to impair, many of the States have, by general statutes, special clauses in corporate charters, or, by constitutional provisions, sought to re-establish over such corporations the legislative control which has always existed in England, and which previous to that decision was supposed to exist in this country.

The language employed to reserve this power in the constitution of Wisconsin is so plain and unambiguous, the intention is so obvious, and the object sought to be attained so evident, that the question whether the legislature of the State has the power to limit the tolls and charges of corporations can hardly be considered debatable.

Twenty years ago, before any of the complainants had invested money in the securities of the railroad corporations of the State, the Supreme Court of Wisconsin had occasion to state the true construction and effect of the provision in our constitution reserving to the legislature power to alter and repeal acts of incorporation. In Pratt *vs.* Brown, 3 Wis., 603, decided in June, 1854, the court say, p. 611:

"The doctrine that a charter of incorporation conferring certain franchises upon a company or individual was in the nature of a grant, and hence, protected from encroachment or attack by the shield of the Federal Constitution, which prohibits the States from passing any laws impairing the obligation of contracts, was established, after elaborate argument and on full consideration, by the Supreme Court of the United States, in the Dartmouth-College case. This doctrine has since that decision been generally acquiesced in by nearly, if not quite, all the State courts in the Union. It is competent, nevertheless, for each State, by constitutional regulation or specific legislative enactment, to reserve the power to modify or repeal all such acts of incorporation.

"When the power of modification or repeal is reserved, either in the one mode or the other, it is obvious that the grantees

must rely, for the perpetuity and integrity of the franchises granted to them, solely upon the faith of the sovereign grantor. Hence, since the decision of the Dartmouth-College case, some of the States, and our own among the number, have by constitutional provisions reserved to their legislatures the right of modification or repeal of all special acts of incorporation, and all such corporations now rest upon the faith of the State, taking care to deserve its favor or command its justice by observing strictly the limit of their powers, and accomplishing by all legitimate means the object of their creation."

This is a very just and clear exposition of the meaning and scope of the reserved power, and was early notice to all who might desire to invest in the stock or securities of corporations existing under the laws of Wisconsin, that such corporations were under the absolute control of the legislature, and that their franchises might be restricted or their charters repealed at any time at the will of the legislature.

The adjudication of the courts of the other States and of this court are all in harmony with the interpretation given to the power reserved over corporations in similar language in the laws and constitutions of other States.

In Massachusetts, Crease *vs.* Babcock, 23 Pick., 334, a bank of which the defendant was a stockholder, had been incorporated with power to repeal, reserved only in case of some violation of the charter, or other default. In that State stockholders were only liable individually on the expiration of the charter, and the defendant insisted that under the clause reserving the right to repeal the charter the default of the bank must first be ascertained and determined by the courts, and until that were done the legislature could not exercise the power of repeal; but the court held that the acceptance of the charter made a compact under which the legislature could repeal, "and the grantees could have no reason to complain of the execution of their own contract." The court also held, that they would presume the contingency upon which the right to repeal depended had happened.

In Roxbury *vs.* Boston & P. R. R. Co., 6 Cush., 424, the object of the bill was to require the defendant to erect a bridge along a highway over the track of defendant. The defendants resisted on the ground that the legislature could not impose this burden on the company.

On page 433, the court say:

"If this act adds anything or makes more explicit the duty imposed by the act of incorporation, it affects the remedy only, and perhaps would be within the competency of the legislature without any reservation of the power of amendment, but if otherwise it was fully warranted by the reservation made by the statutes of 1830, C., 81."

In Commissioners *vs.* Holyoke W. P. Co., 104 Mass., 446, the defendants were the owners by purchase of a dam across the Connecticut River, erected by the Hadley Falls Co., under a charter passed in 1848, which provided that the company should pay such damages to the owners of fishing rights then existing above the dam, as might be assessed by the county commissioners, and such damages were duly assessed and paid.

It was proved that since the building of the dam the number of shad below the dam had gradually diminished; that a small but appreciable portion of the decrease was due to the dam.

The commissioners determined that the defendants should put in fish-ways. This they refused to do on the ground that the legislature had no power under the circumstances to require them to put in fish-ways because it would impair the obligation of the contract contained in the charter.

The court say, page 448:

"In England, where the power of the legislature are unfettered by a written constitution, and no act of a prior parliament can abridge the power of a subsequent one, there could be no doubt of the authority to pass a statute requiring the owner of any dam to erect and maintain such fish-ways as commissioners appointed for that purpose might prescribe. 1 Bl. Com., 90, 160, 161; Hodgelon *vs.* Little, 14 C. B., (N. S.,) 111, 16 C. B., (N. S.,) 198; Rolle *vs.* Whyte, Law Rep., 3 Q. B., 286, 306.

In the United States it has been settled for more than half a century by the decisions of the Supreme Court that a grant or charter from a State legislature is a contract within the meaning of the article of the Constitution which declares that no State shall pass any law impairing the obligation of contracts. Fletcher *vs.* Peck, 6 Cranch 87; Tenett *vs.* Taylor, 9 Cranch, 43; Dartmouth College *vs.* Woodward, 4 Wheat., 518. In a still earlier case, Chief Justice Parsons delivering the judgment of this court, clearly stated the true rule, saying: "We are satisfied that the rights legally vested in this or in any corporation cannot be controlled or destroyed by any subsequent statute unless a power for that purpose be reserved to the legislature in the act of incorporation." Nales *vs.* Stetson, 2 Mass., 143, 146.

But no act of the legislature is to be declared invalid by the courts as a violation of a paramount and controlling article of the Constitution unless the repugnancy between the two is manifest and unavoidable. When a statute has been passed with all the forms requisite to give it the force of law, it must be regarded as valid unless it can be clearly shown to be in conflict with the Constitution. Fletcher *vs.* Peck, 6 Cranch, 87, 128; Dartmouth College *vs.* Woodward, 4 Wheat., 518, 625; Norwich *vs.* County Commissioners, 13 Peck, 60."

It will be noticed that in this case the decision in the case of the Essex Co., 13 Gray, 239, is so far modified that it is held that if the fisheries below the dam were injured whilst compensation was made for the fishing rights above the dam, it was competent for the legislature to require that fish-ways be made, notwithstanding the former act of the legislature, provided that the company should be relieved from the burden of making fish-ways on payment of compensation for the fishing rights above the dam, adopting in this respect the views of this court in reference to the case of the Essex Company as expressed in Lyman *vs.* Holyoke Co., 15 Wal., 500.

In Parker *vs.* Metropolitan R. R. Co., 109 Mass., 506, the same question as presented by the case at bar, came before the court for adjudication.

The East-Boston Ferry Company was incorporated in 1852. The charter provided that the company "shall be allowed to collect and receive such tolls as the said mayor and aldermen (of Boston) shall determine; *provided, however*, that the rates of ferriage shall never be so much reduced as to reduce the yearly dividends of said company to an amount less than eight per cent. on the amount of capital stock actually invested." The rates of ferriage were established at three cents each for adult passengers, and two cents each for children, by the mayor and aldermen of Boston, by an order passed October 4, 1869. The legislature, in 1864, passed an act, chapter 229, § 26, limiting the rate of toll to one cent for each passenger.

By an act passed in 1830, the legislature reserved the right to alter, amend, or repeal every act of incorporation at pleasure.

The court held that the ferry company accepted their charter subject to this reserved power as one of the terms or conditions created by it, and on page 509 say: "The power of regulating tolls upon incorporated ferries, bridges, and turnpikes, has been constantly exercised by the legislature. The great object of such corporations is the accommodation of public travel; and most, if not all, the charters creating them contain provision for the regulation of the tolls they are entitled to charge the public. The charter of the East-Boston Ferry Company contains such provisions. The legislation in question, therefore, is not upon a subject foreign to the provisions of the charter or the objects of the grant. It is strictly an alteration or amendment of such provisions, and it is designed to promote the chief object of the grant.

We have no doubt it was competent for the legislature, under the power reserved to alter or amend this charter, to pass the law we are considering, and that from its passage it fixed the rate of toll which the ferry company was entitled to exact for passengers carried over their ferry in the cars of the defendant."

The acts of incorporation under which the Chicago & Northwestern Railway Company was organized contain provisions in regard to the tolls they are entitled to charge. In Exhibit I, page 31, section 6 confers the right on the company thereby

created, "to demand and receive such sum or sums of money for the transportation of persons and property, and for the storage of property, as it shall from time to time deem reasonable."

In exhibit Q, page 35, section 7, the company thereby created is authorized "to regulate the amount of tolls and the manner of collecting the same for such transportation," &c.

The right to charge toll is derived from the act of incorporation of this company, and does not exist except by virtue of such acts.

Chapter 273, of laws of Wisconsin, 1874, is, in the language of the opinions last cited, "strictly an alteration of such provisions," as confer upon the company the right to charge tolls. It substitutes for the discretion of the company to fix rates. The rates prescribed by the act and those to be fixed by the Railroad Commissioners.

In New York the cases are equally clear and explicit.

In McLaren *vs.* Rennington, 1 Paige, 102, the legislature of New Jersey had incorporated a bank to continue not exceeding twenty-one years, with a proviso that it should be lawful for the legislature at any time to repeal the charter. As a consideration for the charter, $25,000 was paid by the banking company to the State. The bank was organized in June, 1824, paid the $25,000, and commenced operations. In November following, the legislature repealed the act of incorporation, and the court held, Walworth, chancellor, not only that the power to repeal existed under the reservation, but that the court would not presume it to have been improperly exercised.

In the matter of Oliver Lee Bank, 21st N. Y., 9, the bank was organized in 1844, under the general banking law of 1838, which exempted the stockholders from personal liability and become insolvent in 1857.

The 14th section of the articles of association is in the following words:

"The shareholders of this association shall not be liable in their individual capacity for any contract, debt, or engagement

of the association," and the certificate of incorporation contained a similar provision.

The constitution of the State, adopted in 1846, contained a provision imposing personal liability on the stockholders of banks.

The right was reserved in the general banking law of 1838, to alter or repeal it at any time. The court, Denio, justice, page 16, speaking of the reserved power, say: "This, according to one view, is a reservation of a right only to change or repeal it prospectively, from the passage of the modifying or repealing law, so that the association which had been organized in the meantime would remain unaffected by such modification or repeal. On the other hand it is insisted that it enabled the legislature to deal with the associations as though they were directly established by a statute, containing in itself the usual reservation. I am of opinion that the latter is the correct view.

By the revised statutes, the charter of every corporation thereafter to be granted by the legislature, was declared to be subject to alteration, suspension, or repeal in the discretion of the legislature, (1 R. S., 600, 8.) This provision incorporated itself into and became a part of every special charter which was itself silent as to the power of repeal or change."

After holding that the adoption of the constitution of 1848, containing the provision which imposed personal liability, was an alteration of the charter of the Oliver Lee Bank, on the question as to the right of the State to impose personal liability on the stockholders without their consent. The court say, page 21:

"But they had voluntarily consented to become stockholders, upon the conditions held out by the general banking law; one of these conditions was that the legislature might amend and alter the act, and in that way change and modify the constitution of the corporation. A change under this reservation to alter *might render their investment more or less profitable and their position more or less hazardous. Whatever perils it entailed they consented to assume.* Stockholders cannot put in the plea, *non hac in fœdera veni;* for although they have not by a direct

act become parties to the contracts of the association, they have conferred powers upon others to contract to a limited extent in their behalf. In the first place they have empowered the corporation to affect their individual interests to the extent of the corporate authority, and then they have agreed that the corporate power may be changed by the legislature. * * * * * * The super-added liability is as clearly within their contract as that incurred in the first instance, for it has been incurred according to an arrangement to which they were parties. In the two cases referred to in Kernan reports, (1 Kern., 102; 4 Kern., 336,) the defendants insisted that they had never contracted to embark their money in the enterprises which were being actually prosecuted by the directors, but the answer which this court gave was that they had voluntarily embarked their credit in corporations whose powers were liable to be enlarged by the legislature."

In the matter of the Reciprocity Bank, 22 N. Y., 9. This bank was incorporated in 1834. By a special charter which contained a provision that the legislature might "at any time alter, modify, or repeal the same," no personal liability was imposed on the stockholders by the original charter. The same question was presented as in the Oliver Lee Bank case, *supra*, whether the constitution of 1846 and general statute of 1849 had the effect to alter the charter and impose upon the stockholders personal liability for the corporate debts. Referring to the case of the Oliver Lee Bank, the court say, page 3:

"In holding that a personal liability could be lawfully imposed upon the shareholders of that bank, the decision was placed upon the reserved right to alter or repeal the general act under which it was organized. In the present case, as well as in that, the exercise by the legislature of the power in question is certainly none the less effectual because it has the super-added sanction of a constitutional provision. Nor can a constitutional provision, declaratory of a change in the principles of a corporate organization, be said to affect or impair a charter which, in its own terms, admits of the very change declared. If the legisla-

ture, in pursuance of a right reserved, may alter or repeal the charter of a corporation without violating the obligation of a contract, the same thing, I apprehend, may be done by the people when they establish the fundamental law of the State."

The alteration in the last two cases cited was of a vital character, when it is considered that profit is the controlling motive which induces investment in the stock and securities of corporations; here was a burden of personal liability imposed which might be and was of a very onerous and perhaps ruinous character to the stockholders. Not only was the money invested in the stock lost, but they were called upon to part with a portion of their fortunes which they never intended to place in jeopardy by becoming stockholders. In the first case, to the suggestion that if the stockholders did not desire to take the risk of the new and extended liability imposed, they might surrender their franchise and stop business. It was answered that the parties litigating before the court were a minority of the stockholders and were powerless to prevent a continuance of the business of the bank as against the determination of the majority of the stockholders. To this it was replied that, that was one of the risks assumed in becoming stockholders and they could not complain that one of the conditions of the agreement they had made was being executed, however onerous and disastrous it might prove.

We might cite the decisions of other States, but it is deemed unnecessary in view of the fact that the question of the extent of such reserved power has been so often and fully considered recently by this court that we do not regard it as an open question. The case of the Oliver Lee Bank, *supra*, was appealed to this court and is reported under the title of Sherman *vs.* Smith, 1 Black, 587. The decision of the court of appeals of New York was fully sustained, this court saying, on page 593:

"Now the 32d section, which reserved to the legislature the power to alter or repeal the act by necessary construction, reserved the power to alter or repeal all or any one of these terms or conditions or rules of liability prescribed in the act."

Pennsylvania-College cases, 13 Wal., 190.

In 1802, the legislature chartered a college by the name of

Jefferson College. Section 1 provided, "That there be and hereby is erected and established *in Cannonsberg*, &c., a college," &c.

Power to alter was reserved by section 5, as follows: "And the same (the charter) shall not be altered or alterable by any ordinance or law of the said trustees, nor in any other manner *than* by an act of the legislature of this commonwealth."

By an act of the legislature, passed March 4, 1865, Jefferson College was united with a college at Washington, in the same county, into one corporation, providing for the education of certain classes of the students in each college-building, and dissolving the original corporation, except so far as was necessary to close up its business.

By an act passed February 26, 1869, the several departments of the consolidated corporation were authorized to be located either at Cannonsberg, Washington, or some other suitable place in the State. Subsequently the whole college was fixed at Washington, thus wholly obliterating the original college at Cannonsberg. The question was, whether, under the power reserved, the legislature could thus deal with the chartered rights of Jefferson College?

The court say, page 213, *et seq.*: "Charters of private corporations are regarded as executed contracts between the Government and the corporators, and the rule is well settled that the legislature cannot repeal, impair, or alter such a charter against the consent or without the default of the corporation, judicially ascertained and declared. Of course these remarks apply only to acts of incorporation which do not contain any reservations or provisions annexing conditions to the charter modifying and limiting the nature of the contract. Cases often arise where the legislature, in granting an act of incorporation for a private purpose, either make the duration of the charter conditional, or reserve to the State the power to alter, modify, or repeal the same at pleasure. Where such a provision is incorporated in the charter it is clear that it qualifies the grant, and that the subsequent exercise of that reserved power cannot be regarded as an act within the prohibition of the constitution. Such a power, also, that is, the power to alter, modify, or repeal an act of incor-

poration, is frequently reserved to the State by a general law, applicable to all acts of incorporation, or to certain classes of the same, as the case may be, in which case it is equally clear that the power may be exercised whenever it appears that the act of incorporation is one which falls within the reservation, and that the charter was granted subsequent to the passage of the general law, even though the charter contains no such condition, nor any allusion to such a reservation. Reservations in such a charter, it is admitted, may be made; and it is also conceded where they exist, the exercise of the power reserved by a subsequent legislature does not impair the obligation of the contract created by the original act of incorporation."

In Tomlinson *vs.* Jessup, 15 Wal., 454. The Northeastern Railroad Company was incorporated in 1851. A general law of the State, passed in 1841, provided that every charter or incorporation should "at all times remain subject to amendment, alteration, or repeal by legislative authority."

In 1855 an act was passed by which the stock and real estate of the company should be exempted from taxation during the continuance of the charter, which was fifty years.

It does not appear from the case, but it is presumed this exemption was made as an inducement to subscribe for stock and purchase the bonds of the company.

In 1868 a new constitution for the State was adopted which provided that the property of all corporations should be subject to taxation.

The court say, page 459:

"The object of the reservation and of similar reservations in other charters, is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise, if the public interest should at any time require such interference. It is a provision intended to preserve to the State control over its contract with the corporators which, without that provision, would be irrepealable and protected from any measure affecting its obligation."

Again, on page 459, it is said: "The reservation affects the entire relation between the State and the corporation, and places under legislative control, all rights, privileges, and immunities derived by its charter directly from the State."

The case of Miller *vs.* State, 15 Wall., p. 478, was where a railroad company was organized under the general laws of the State of New York, whose constitution had a similar clause to our own, as to alteration and repeal. By the original charter of the company a capitial of $800,000 was provided for, to build a road fifty miles in length. The city of Rochester was authorized by law to subscribe for $300,000 of capital stock, and was to have the right, by the act of the legislature, to appoint four out of the thirteen directors of the company. All but 18 miles of the road was abandoned, and the legislature afterwards passed an act, authorizing the city of Rochester to appoint seven directors, that being a majority of the whole number, and this last act was assailed as impairing the obligation of contracts. The courts of New York held the act constitutional, and the Supreme Court of the United States affirmed the decision, citing and approving the language above quoted from 15 Wallace.

And on pages 488–9, the court say:

"Such power also, that is the power to alter, modify, or repeal an act of incorporation is frequently reserved to the State by a general law, applicable to all acts of incorporation, or to certain classes of the same, as the case may be, in which case it is equally clear that the power may be exercised whenever it appears that the act of incorporation is one which falls within the reservation, and that the charter was granted subsequent to the passage of the general law, even though the charter contains no such condition, nor any allusion to such a reservation."

In this last case cited, by an arbitrary act of the legislature the control was taken out of the hands of the persons to whom it was entrusted by the original charter, and given to other persons, and yet the power of the legislature to do so is fully sustained.

These cases place the reserved power to alter or repeal any act of incorporation which is subject to it, upon too firm a basis to

be shaken. The right to destroy a corporation by repeal would of itself include the power to impose any condition or burden upon it which the legislature might think proper, and if such condition or burden should prove too onerous to be borne, or so decrease or destroy the revenues of the company that it could no longer continue business, such condition or burden would have no worse effect than an absolute repeal of the charter, which no one, so far, in this discussion, has had the temerity to deny. The legislature possesses the power to do so, and may exercise it at pleasure.

In the case of Olcott *vs.* The Supervisors, 16 Wall., 673, this court had the question in the case at bar of the right of the legislature of Wisconsin to regulate and limit the tolls and rates of compensation of railroad companies in that State before it, and applied the doctrine of the cases cited. Opinions, p. 688, as follows:

"That the legislature of Wisconsin may alter or repeal the charter granted to the Sheboygan & Fond du Lac Railroad Company is certain. This is a power reserved by the constitution. The railroad can therefore be controlled and regulated by the State. *Its use can be defined; its tolls and rates for transportation may be limited.*"

This was said in a case where it was claimed, and the claim was sanctioned by this court, that railroad companies are so far public corporations that money may be raised by taxation and donated to them to aid in the construction and operation of the roads.

The following, taken from the opinion of the Attorney-General of the State, presents a just view of the claim set up that there are certain limitations on the powers under consideration, not apparent from the language employed in expressing it which restricts the power to alter, to the non-essential franchises and places the most important franchise conferred upon railroad corporations, that of exacting tolls, beyond the reach of legislative control. He says:

"It is, I understand, conceded by all who have given opinions hostile to this legislation, that, by virtue of the constitutional reservation, all acts of incorporation may be absolutely repealed and the corporations created by them dissolved. If the legislature can thus wholly destroy every corporation it has created, and compel a total surrender of all franchises and privileges, and of all power to transact business, except such as may be necessary to convert its property into money and wind up its affairs, it seems difficult to urge any valid reason against legislation which merely limits the corporate power and restricts the privilege of charging higher rates for transportation than the legislature may deem just and equitable. But it is now claimed by those who propose to disregard the law of 1874, that although the power reserved in the constitution to alter all acts creating corporations is in terms unlimited, this reserved power is still subject to certain latent limitations, which it is the duty of the courts to recognize and define; that among the latent limitations one is to be found or created which prevents the legislature from reducing the charges for transporting passengers and freight below a reasonable compensation.

"The result of this doctrine would be practically to repeal the constitution of the State, so far as this clause is concerned, and to restore to corporations in this vital particular that exemption from legislative control secured to them by the Dartmouth-College decision, and to guard against which the clause was incorporated into the constitution of the State.

"The power to alter is given, by the constitution, just as clearly as the power to repeal, and it is difficult to see why a limitation cannot as well be applied to the one as to the other. If the State may take away the franchise entirely, why may it not so regulate and control its exercise as to further the public purpose for which it was bestowed? Ordinarily the greater includes the less; here the lesser power is given in express terms. The legislature may 'alter,' and this word must be given some signification different in sense or in degree from the power to repeal. It cannot be said to apply to the right of taxation and police regulation, for these are inherent in the State, applicable

alike to individuals, and corporations and in no way dependent on the clause of the constitution referred to. It must mean that the legislature may in its discretion, instead of taking the extreme and severe measure of repeal, exercise the lesser and milder right, and impose such restrictions and conditions upon the conduct of the affairs of the corporation, and so limit its charges as will best promote the object of its creation and prevent the abuse of the powers and privileges granted to it.

"The corporations cannot justly complain of this. They have accepted their charters subject to this express reservation, and having so accepted, they hold them upon the faith of the State only, taking care to deserve its favor or command its justice by the manner in which they exercise the power conferred. If a wrong is done or a mistake made in the exercise of the reserved power, the aggrieved party must resort to the legislature for redress. This was the agreement created by the acceptance of the charter and the application for relief must be made to the tribunal selected by the contracting parties. The courts cannot interfere, for, says Chancellor Kent, 'the legality of the reservation cannot be questioned.' Should the legislature refuse or fail to correct the wrong, no worse results could ensue to the corporation than would have followed from absolute repeal. But it is hardly to be supposed that the legislature would fail to respond to any application founded in justice. The people cannot fail to appreciate the necessity of railroads to the business and industrial interests of the State and to the convenience and prosperity of all its citizens. They do not desire any unwilling or uncompensated service from the railroads, nor will they consent that the State should be placed in a condition of servitude to the corporations."

"But if this limitation, that the rates fixed by the legislature must be reasonable, exist at all, it arises not from the reservation or its construction, but rather out of the common law rule that in the absence of any legislative enactment on the subject, common carriers are bound to carry all freight and passengers which are offered at reasonable rates, and cannot discriminate unjustly

between shippers. In my judgment it is impracticable to apply this common law rule to railroad corporations, as a substitute for legislative control and regulation.

"The use of railroads has increased the business of transporting freight and passengers to immense proportions; it has brought about great and radical changes in the commerce and business of the country; it has created new and diverted old channels of trade, built cities and formed States. The gigantic corporations controlling the railroads of the country, with their great wealth and influence are practically placed beyond the reach of the common law obligation and this warrants the position that legislative control ought to be and is put in the place of this common law liability of common carriers. Besides a suit by the individual to enforce the common law liability settles nothing. No general rule can be established in a single suit, while such a suit would involve an inquiry and determination of the cost of the road and its equipment, the operating expenses, the amount and character of the business, and the whole detail of the condition, management, and relative cost of everything connected with the road. When this is done the reasonableness of the charge in every other instance remains open to be litigated at such an expenditure of time and money as to deter individuals from entering such a field of hopeless litigation. I am led to the conclusion that the better view is, that the judgment of the legislature is by the reservation of power, and the necessities of the case, the measure of the reasonableness of the regulation imposed. The corporation certainly cannot arbitrarily determine the question, and on the assumption that the rates are unreasonable disregard the law. The legislative act is conclusive that the rate is reasonable. The exercise of the power is of itself an assertion of its justice and of its necessity. The railroads cannot question it; the courts may not review it, for by the agreement of the parties in accepting the charters under the reservation, the whole subject is withdrawn from the domain of judicial decision and remains only a matter for the legislative conscience.

"And so with the objection that the provisions of this law

assumes control of the property of the corporation, and deprives them of its use without making any compensation, and is therefore in conflict with the constitution of the State and of the United States.

"As these corporations have no natural existence, but are created wholly by legislative enactments, their power to act, in every particular, is derived from the State; their capacity to make contracts, acquire and use property, and to charge for its use comes from the State, and is granted on such terms and to such extent as the legislature may prescribe; the power of the State to grant is given by the constitution and coupled with this power is found in the same fundamental law, the authority to alter the act of incorporation as the legislature may think the public interests demand. The rights and privileges conferred cannot be separated from the restrictions and duties imposed. The power to take toll cannot be distinguished from the duty to take only such as the legislature shall establish. It is difficult to see how restricting these tolls within certain limits which the legislature deems just, is any more depriving the corporations of their property than it would be to repeal their charters and thus deprive them of the power of charging any rates at all, and this latter power may confessedly be exercised without making compensation.

"Whether the State can compel the companies to operate their road for such compensation as it chooses to prescribe, is another and different question, not involved in this discussion. The only inquiry, while companies are openly violating the law by charging higher rates than it allows is, as to the power of the legislature to prohibit them from charging above certain fixed rates.

"If it shall be made to appear that the companies cannot operate their roads except at a loss under the rates fixed by the law, the remedy is not in an attitude of open hostility to the law, but in an application to the legislature for its modification. As suggested in relation to the other objection, this is the forum which the constitution has provided for the determination of that question, and in accepting the charters, the companies

assented to be governed and bound by the legislative sense of justice. This sense of justice will undoubtedly coincide with the mutual interest of the people and of the railroad companies. These interests demand, with a force almost equal to the provisions of positive law, that remunerative rates shall be allowed for the services of these corporations; but as a mere question of legal right, full power has been reserved by the constitution, in the language of Olcott *vs.* Supervisors, *supra*, to alter or repeal the charters of these corporations, and the roads can *therefore* be controlled and regulated by the State, their use can be defined, and their tolls and rates for transportation limited."

While the exercise of the reserved power has been upheld in every instance in which any case involving its exercise has come before the courts, State or national; yet, in some of the cases dicta may be found to the effect that the power of the legislature to alter acts of incorporation is not wholly unlimited.

This dicta first appears in the case of the Essex Co., 13 Gray, 239, and in the case of Miller *vs.* The State, 15 Wall., 478, the limitation of this power is referred to and defined as follows:

"That it cannot be exercised to take away or destroy rights acquired by virtue of such a charter, and which, by a legitimate use of the powers granted, have become vested in the corporation.

* * * * * * *

Such reservation, it is held, will not warrant the legislature in passing laws to change the control of an institution from one religious sect to another, or to divert the fund of the donors to any new use inconsistent with the intent and purpose of the charter, or to compel subscribers to the stock, whose subscription is conditional, to waive any of the conditions of their contract."

This is really only repeating the limitation which exists on all legislative power, and has no special application to legislation under the reserved power. It is simply declaring that the legislature cannot transfer by an arbitary act of legislation the property of one person or class of persons to another, whether the

title to such property be in a corporation or natural person, and cannot annul valid contracts.

We do not claim that this reserved power gives to the legislature any right over the property of the corporation. It can only deal with the franchises. Over them it has absolute control.

That the right of a corporation to take tolls is a corporate franchise, is too well settled to admit of doubt.

In Thorpe *vs.* R. & B. R. R. Co., 27 Vt., p. 146, the court say:

"The privilege of running the road and taking tolls or fare and freight is the essential franchise conferred."

In B. & L. R. R. Co. *vs.* S. & L. R. R. Co., 2 Gray, 27, the court say:

"A right to maintain a railroad and take the tolls and profits is created and granted them by the government of the State * * * * It is a right or title which, if it exist at all, is purely a statute right. It is created by law; it exists only in contemplation of law."

Again, on page 29, the court say:

"A toll is granted for the sole benefit of such corporation upon all passengers and property of all descriptions which may be conveyed or transported on said road at such rate as the company in the first instance shall fix. This is in every respect a public grant; a franchise which no one could enjoy, but by the authority of the Government."

In Alcott *vs.* Banfil, 4 New Hamp., 545, the court say:

"When individuals, under a charter from the Government, construct works for the public accommodation and open the works to the public use, this is, in law, a dedication of the works to the public use, *and no toll can be demanded unless it be authorized by the charter.*"

In Hull Dock Co. *vs.* Brown, 1 East., 575, "Where no tolls are expressly imposed they are not imposed by inference; those who

seek to impose a burden upon the public must take care that the claim rests upon plain and unambiguous language."

But this question was long ago fully and fairly settled by this court, and is no longer debatable.

In Perrine *vs.* Chesapeake & Del. Canal Co., 9 How., 172, the court say, p. 184:

"It is the well settled doctrine of this court that a corporation created by statute is a mere creation of the law, and can exercise no powers except those which the law confers upon it, or which are incident to its existence. Head et. al. *vs.* The Providence Insurance Co., 2 Cranch, 127; Dartmouth-College case, 4 Wheat., 636; Bank of United States *vs.* Dandridge, 12 Wheat., 64; Charles River bridge *vs.* Warren bridge, 11 Pet., 544; Bank of Augusta *vs.* Earle, 13 Pet., 587.

The error consists in regarding the title of the company to the property as derived to them upon common law principles. The corporation has no rights of property except those derived from the provisions of the charter. Nor can it exercise any powers over the property it holds, except those with which the charter has clothed it. And whether it may demand compensation from a person whom it permits to pass over its property must depend upon the language of its charter and not upon the rules of the common law."

In view of this emphatic declaration of the law on this subject, it is in vain for learned counsel to argue that the Chicago & Northwestern Railway Company possesses any right to demand or receive compensation for the transportation of persons and property upon its railroad except what is expressly granted by its charter, and such grant must of necessity be alterable under the power reserved in the constitution of the State. Chapter 273 is a strict exercise of this right to alter the franchise of the corporation to exact tolls. It changes this franchise from an unlimited one to a limited one. A strong effort is made in this case, as it was in the case last cited, to establish the power of a corporation to take tolls, as existing outside of the

powers granted by the legislature, and one learned counsel, driven by the decisions of this court from the domain of the common law, appealed to the "higher law," as the source of this right, whilst another equally learned council thought it might be derived from the law of nations. All discussion of this question only serves to strengthen and confirm the rule of law on this subject as settled by this court. And the conclusion is inevitable that, if it be a franchise granted by the legislature, it is alterable at the legislative discretion.

And while it may be freely conceded that the legislature can not appropriate the property of the corporation to the public use, or transfer it to other corporations or individuals, any more than it can the property of individuals, yet it can prohibit the corporation from using it as a corporation, or from charging any tolls, or more than fixed rates of tolls, for its use. The cases cited hold that this right of charging tolls is a franchise granted by the State, and such franchises as the State grants it has reserved the power to alter or repeal, in unmistakable language. No one will dispute that it would have been clearly within the legislative power, when the acts creating the corporation were passed, to have limited its charges; and, under the power to alter, it may do everything which it might have done at the time of creating the corporation.

III.

It is also claimed that although it be held that the legislature of Wisconsin had the constitutional power to reduce the tolls of the company, yet that power could only be exercised on making compensation to the corporation, or the stockholders thereof. In other words, that chapter 273 is a violation of the thirteenth article of the bill of rights in the constitution of Wisconsin, which is as follows:

"The property of no person shall be taken for public use without just compensation therefor."

It would be a sufficient answer to this claim that chapter 273 does not in any way take or deprive the corporation of its property.

But it is argued that the income or profit of property is essentially the property itself, and that by reducing the tolls below the point of compensation the property is really destroyed, if not taken.

But this result would follow the repeal of the charter to a still greater extent, and no one has ever contended that where a charter was rightfully repealed the stockholders would be entitled to compensation, in either case of the reduction of tolls below compensatory rates or the repeal of the charter; the title to the property is unaffected. It remains a fund,

1st. For the payment of the corporate debts.

2d. The residue to be distributed amongst the stockholders.

The franchises which the State granted are alone altered or recalled; in these the corporation had no right of property, had no right to expect their continuance beyond the pleasure of the legislature. It was the condition upon which they were granted and accepted, that they might be altered or repealed at the pleasure of the legislature of the State, and certainly no one can complain that the condition is enforced.

This question has already been fully adjudicated in principle by this court.

In West River Bridge Co. *vs.* Dix, 6 How., 307, it was held that the property of a chartered company might be taken for public use upon compensation being made.

In Vermont there was no reserved power to alter or repeal acts of incorporation.

Mr. Justice McLean stated the true principle governing the franchise on page 539. He says:

"No State could resume a charter under the power of appropriation and carry on the functions of the corporation. A bank charter could not be thus taken, and the business of the bank continued for public purposes. Nor could this bridge have been taken by the State and kept up by it as a toll-bridge. This could not be called an appropriation of private property to public purposes. There would be no change in the use except the application of the profits, and this would not bring the act within the

power. The power must not only be exercised *bona fide* by a State, *but the property*, not its products, must be applied to public use."

In other words, taking the property of a corporation by the right of eminent domain is wholly different from recalling its franchises by an act of the legislature under the reserved power. The State has no use for the particular franchises granted to a corporation. They emanate, when granted, from the sovereign power of the State; when the grant is repealed, their use is wholly destroyed. It is, therefore, impossible for a State to apply the particular franchises possessed by a corporation to a practical use; when recalled, they are merged in the higher sovereign power of the State. The alteration or repeal of corporate franchise is, therefore, not in any respect an exercise of the right of eminent domain, and no compensation is required to be made.

In Charles River bridge *vs.* Warren bridge, 11 Pet., 420, where the question arose whether the legislature had the right to wholly destroy the value of the Charles River bridge, which was erected and maintained in pursuance of a franchise granted by the State, by authorizing the erection of a free bridge so near as to render the Charles River bridge valueless.

The same argument was urged in that case as in the one at bar; but the court say, page 545:

"But the case most analagous to this, and in which the question came more directly before the court, is the case of the Providence Bank *vs.* Billings, *et al.*, 4 Pet., 514, and which was decided in 1830. In that case it appeared that the legislature of Rhode Island had chartered the bank in the usual form of such acts of incorporation. The charter contained no stipulation, on the part of the State, that it would not impose a tax on the bank, nor any reservation of the right to do so. It was silent on this point. Afterward, a law was passed imposing a tax on all the banks in the State, and the right to impose this tax was resisted by the Providence bank upon the ground that, if the State could impose a tax, it might tax so heavily as to render the franchise

of no value and destroy the institution; that the charter was a contract, and the power which may in effect destroy the charter, is inconsistent with it, and is impliedly renounced by granting it. But the court said the taxing-power was of vital importance and essential to the existence of government, and that the relinquishment of such a power is never assumed. * * * *

The case now before the court is, in principle, precisely the same. It is a charter from a State. The act of incorporation is silent as to the contested power. The argument in favor of the proprietors of the Charles River bridge is precisely the same, almost in words, with that used by the Providence bank, that is, that the power claimed by the State, if it exists, may be so used as to destroy the value of the franchise they have granted to the corporation. The argument must receive the same answer, and the fact that the power has already been exercised so as to destroy the value of the franchise cannot in any degree affect the principle. The existence of the power does not and cannot depend upon the circumstance of its having been exercised or not."

If a State can thus destroy the value of corporate property acquired under franchises which are granted unconditionally and are in the nature of a contract, there would seem to be no room for doubting that it may do so in any case where the power to alter or repeal the franchise is expressly reserved.

This doctrine is re-affirmed in Turnpike Co. *vs.* the State, 3 Wal., 210. The court say, p. 213:

"No exclusive privileges had been conferred upon it, (Turnpike Co.,) either in express terms or by necessary implication; and hence, whatever may have been the general injurious effects and consequences to the company from the construction and operation of the rival road, they were simply misfortunes which may excite our sympathy but are not the subject of legal redress."

The principle deducible from these cases, as applicable to the one at bar, is, that if a legislative power exist, no matter how

injuriously its exercise may affect the value of property, no claim for compensation for such injuries can be made except where the property is actually taken for the public use; such losses are simply misfortunes which may excite the sympathy of courts, "but are not the subject of legal redress."

V.

The bondholders and mortgagees of the company have no greater rights, or immunity from legislative control, than the corporation itself, and the existence of such obligations in no way impairs or defeats the power of the legislature to alter or repeal the corporate franchises.

None of the cases cited for the complainants sustain the doctrine contended for.

Bronson *vs.* Kensie, 1 How., 311, holds that the law known as the stay-law of Illinois, giving mortgagors a year after sale to redeem, and forbidding a sale of the mortgaged premises at less than two-thirds of appraised value, unconstitutional as impairing the obligation of the contract.

McCracken *vs.* Hayward, 2 How., 608, is a decision on the same law in respect to execution sales, and is to the same effect as the case last above cited.

Curran *vs.* Arkansaw, 15 How., 305. The State, having chartered a bank and invested it with capital and power to issue bank-notes, afterwards withdrew the funds and appropriated them to State use; held that as against the creditors of the bank such act was invalid. Opinion by Curtis, J., in which he expressly recognizes the right of the State to repeal the charter, but holds the property of the bank to be a trust fund for the payment of its debts, and that the State could not appropriate such property to its own use, as against the equitable lien of the creditors.

In Hawthorne *vs.* Calif, 2 Wal., 10, the State of Maine incorporated a railroad company. The charter provided that the shares of stockholders should be liable for the debts of the corporation, and, in case of defficiency, the shareholders should be

liable to the creditors in an amount equal to their respective shares. There was no reservation of power to alter or repeal the charter. A few months after the debt to Hawthorne was contracted, the legislature repealed the individual-liability clause. Held, that the provision of the charter making the stockholders liable to the creditors of the corporation became incorporated into the contract, and the legislature could not destroy it. Citing Woodruff *vs.* Trapual, 10 How., 190, and Curran *vs.* Arkansas, *supra*.

These were all cases where by act of the legislature it was attempted to put the property of the corporation beyond the reach of the creditors, who had an equitable lien upon it, or to destroy contracts under which rights had vested where there was no reserved power.

The case of Miller *vs.* Erie R. R. Co., 21 Barbour, 513, which was cited by complainant's counsel on this point in the court below, (and which is cited in 15 Wal., 498,) was overruled by the court of appeals in the Albany N. R. R. Co. *vs.* Bradwell, 24 N. Y., 357.

On the other hand, the rule of law is well settled in this court that creditors and stockholders have no rights superior to the corporation itself as against legislative interference.

In Muma *vs.* The Potomac Co., 8 Pet., 281, the court say, page 287:

"A corporation by the very terms and nature of its political existence, is subject to dissolution by a surrender of its corporate franchises, and by a forfeiture of them for wilful *misuser* or *non user*. Every creditor must be presumed to understand the nature and incidents of such a body politic, and to contract with reference to them. And it would be a doctrine new in the law that the existence of a private contract of the corporation should force upon it a perpetuity of existence contrary to public policy and the nature and objects of its charter."

In Pennsylvania-College cases, 13, Wall., *supra*. Jefferson College had issued a large number of contracts for scholarships,

for the purpose of raising an endowment fund. Such contracts were outstanding to a large amount at the time of the passage of the act, altering the charter of the college, and a claim was made, on the part of the holders of these contracts for scholarships, that the act of the legislature altering the charter impaired the obligation of such contracts. In answer to this claim the court say, page 218:

"Persons making contracts with a private corporation, know that the legislature, even without the assent of the corporation, may amend. alter, or modify their charters in all cases where the power to do so is reserved in the charter, or in any antecedent general law, in operation at the time the charter was granted, and they also know that such amendments, alterations, and modifications may, as a general rule, be made by the legislature, with the assent of the corporation, even in cases where the charter is unconditional in its terms, and there is no general law of the State containing any such reservation. Such contracts made between individuals and the corporations do not vary, or in any manner change or modify the relation between the State and the corporation, in respect of the right of the State to alter, modify, or amend such a charter, as the power to pass such laws depends upon the assent of the corporation or upon some reservation made at the time, as evidenced by some pre-existing general law or by an express provision incorporated into the charter."

This clear and just exposition of the relation which creditors bear to the corporations and to the legislative power of the State which creates them, renders it unnecessary to protract discussion on this point.

It would be a remarkable condition of things if it were held, that under this reserved power the legislature could alter at pleasure the franchises of a corporation so long as it kept out of debt; but by contracting debts the corporation could suspend the power, and thus by keeping in debt wholly defeat its operation.

The act of the legislature limiting the tolls and charges of

the complainant, is not an encrochment on the power of Congress to regulate commerce among the several States.

No discrimination is made between freights carried for citizens of the State, or persons not citizens thereof.

It would seem that the statementof this proposition was sufficient proof of it.

It has never been intimated any where, that the power which railway companies exercise to fix their rates of charges and tolls, was an invasion of the power of Congress, to regulate commerce among the States. How is it any more objectionable for the State to reserve that power to itself, either in granting a charter, or by a subsequent alteration of it, than it is to confer it on the corporation itself. The power to fix and limit the charges of railroad corporations, must reside some where, either in the State, or the corporation, and its exercise by the one is no more a regulation of commerce among the States, than by the other.

It is very justly said, in the case of the State Freight Tax, 15 Wal., 277:

"We concede the right and power of the State to tax the franchises of its corporations; and the right of the owners of artificial highways, whether such owners be the State or grantees of franchises from the State, to exact what they please for the use of their ways. That right is an attribute of ownership."

Here it is complained that the cost of transportation is being cheapened instead of increased.

The contract of a railroad company which provides that all grain passing over its road should be handled by an elevator company at a fixed price for fifteen years, although it may increase the cost of transportation of grain, is not an infringement of the power of Congress to regulate commerce. Railroad Company *vs.* Richmond, 19 Wal., 584.

But this question may be regarded as settled by the decision of this court in Railroad Company *vs.* Maryland, 21 Wal., 456. The court say, p. 471:

"This unlimited right of the State to charge, or to authorize

others to charge toll, freight, or fare for transportation on its roads, canals, and railroads, arises from the simple fact that they are its own works or constructed under its authority. It gives them being. It has a right to exact compensation for their use. It has a discretion as to the amount of that compensation. That discretion is a legislative—a sovereign—discretion, and in its very nature is unrestricted and uncontrolled. The security of the public against any abuse of this discretion, resides in the responsibility to the public of those who, for the time being, are officially invested with it. In this respect it is like all other legislative power, when not controlled by specific constitutional provisions, and the courts cannot presume that it will be exercised detrimentally."

The other minor questions, such as that chapter 273 was repealed by other acts, were rightfully disposed of by the circuit court, and are not, we think, worthy of serious argument here.

A. SCOTT SLOAN,
Att'y-General and Sol'r for Def'ts.

I. C. SLOAN,
Of Counsel.